Effects, or from Effects to their Cauſes: Thus we conclude the truth of a thing by its connection with another to which it is joined: Thus, when one thing is ſignified by another, we preſume the truth of that which is ſignified, by the certainty of that which ſignifies it. And it is out of theſe different Principles that Signs, Conjectures, and Preſumptions are formed. Concerning which there can be no certain Rules laid down; but in every caſe it will depend on the prudence of the Judge, to diſcern whether the Preſumption be well or ill grounded, and what effect it may have to ſerve as a Proof[c].

[c] Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt. *l.* 3. §. 2. *ff. de teſtib.*

Ex ſententia animi tui te æſtimare oportet, quid aut credas, aut parùm probatum tibi opinaris. *d. l.* 3. §. 2. *in f.*

IV.

4. Preſumptions are either concluding, or uncertain.

There are Preſumptions of ſuch a nature, that what is preſumed paſſes for truth, without any neceſſity of being corroborated by ſtronger proofs, if the contrary is not proved: and there are Preſumptions which have no other effect, if they are alone, than that they form a bare Conjecture, and do not make that which is preſumed to paſs for truth. Thus, in the caſe of a Poſſeſſor which has been mentioned in the firſt Article, his poſſeſſion makes it to be preſumed that he is the true Owner, and without other proofs he is accounted as ſuch, and will be maintained in his poſſeſſion until he who diſturbs him therein eſtabliſhes his Right clearly. Thus on the contrary, in the caſe of him who had threatened another with death, of which likewiſe mention has been made in the ſame Article, the threatning which preceded the death of the perſon who was menaced makes againſt the perſon who threatened only a Conjecture, and altho' he ſhould not prove his innocence, if there were no other proof againſt him, this Preſumption would not be ſufficient to convict him of being the Author of the Crime[d].

[d] Indiciis ad probationem indubitatis, & luce clarioribus. *l. ult. de probat.* Argumentis liquidis. *l.* 2. *in f. C. de in lit. jur.* See the preceding Articles, and thoſe which follow, as alſo the Preamble of this Title.

V.

5. Two ſorts of Preſumptions.

This difference between Preſumptions which have the effect of Proofs, and thoſe which leave ſome doubt, is the foundation of another diſtinction of two ſorts of Preſumptions: One is of thoſe which are authorized by the Law, and which are appointed to be held as Proofs; and the other is of thoſe of which the Law leaves the effect to the Prudence of the Judge, who ought to diſcern what may, or may not ſuffice to give to a Preſumption the force of a Proof. Thus, in the ſame caſe of a Poſſeſſor, the Law will have him to be held for the true Owner, if it is not proved that he is not[e]. Thus, the Laws ordain a Thing that is adjudged to be held for Truth[f]. Thus, they enact, that he who is born of a married Woman, and conceived during the time of Wedlock, ſhall be reputed the Son of the Huſband[g]. Thus, they have regulated that if a married Woman be found to have any Goods, or Effects, which it is uncertain by what Title ſhe has acquired them, they ſhall be accounted to be her Huſband's Goods[h]. But on the contrary, there is an infinite number of Preſumptions which the Laws leave doubtful, and which may be eaſily gueſſed at without any Example.

[e] *See the firſt Article.*

[f] Res judicata pro veritate accipitur. *l.* 207. *ff. de reg. jur.*

[g] Pater is eſt quem nuptiæ demonſtrant. *l.* 5. *ff. de in jus voc. l.* 6. *ff. de his qui ſui vel al. jur. ſunt.*

[h] *See the ſeventh Article of the fourth Section of Dowries.*

VI.

6. Proofs without Witneſſes, and without Writing, by the force of Preſumptions.

It follows from all the Rules explained in the foregoing Articles, that it often happens not only in Civil, but alſo in Criminal Matters, that certain Proofs may be had without Writing, and without Witneſſes, by the force of Preſumptions, when they are ſuch, that upon certain and known Facts we may found neceſſary conſequences of the truth of thoſe which are to be proved[i]. Whether it be that we judge of Cauſes by their Effects, or of Effects by their Cauſes, or that we diſcover the truth by other Principles. Thus, in the Judgment of *Solomon* between the two Women, it appears that he foreſaw the commotions which would be produced in the heart of the Mother by the fear of the death of her Child; and knowing the Cauſe by its effect, he judged of the one by the tenderneſs ſhe expreſſed, which was the neceſſary effect of her Maternal Love, that ſhe was the true Mother of the Child; and by the indifference and inſenſibility of the other, that the Child was to her a Stranger.

[i] Sæpè ſine publicis monumentis cujuſque rei veritas deprehenditur. *l.* 3. §. 2. *ff. de teſtib.* Sine (ſcripturis)

(ſcripturis) valet quod actum eſt, ſi habeat probationem. *l. 4. ff. de fide inſtrum. l. 5. eod. l. 4. C. de prob.* Quod licet ſcriptura non probetur, aliis tamen rationibus doceri nihil impedit. *l. 5. C. fam. erciſc.* See the Example of the Edict of 1556, at the end of the Preamble to this Title.

VII.

7. Facts that are held as true. Facts that muſt be proved.

When the queſtion is concerning the regard which ought to be had for Preſumptions, it is neceſſary to diſtinguiſh two ſorts of Facts. Some Facts are ſuch, that they are always reputed to be true, till the contrary has been proved; and there are others which are always reputed contrary to truth, unleſs they are proved. Thus, every thing that happens naturally and commonly, is held for true; as on the contrary, what is neither common nor natural, will not paſs for truth, if it is not proved. It is upon this principle that the Preſumptions are grounded, that a Father loves his Children; that every one takes care of his own concerns; that he who pays, was indebted; that perſons act according to their principles and their cuſtom; that every one uſually governs himſelf by Reaſon, and conſequently acquits himſelf of his engagements, and of his duty: And we ought never to judge without proof, nor preſume, that a Father hates his Children, that any perſon abandons his own Intereſt, that a wiſe man has committed an Action unworthy of his uſual Conduct, nor that one has failed in any point of his duty. Thus in general, all Facts which are contrary to that which ought to happen naturally, are never preſumed, unleſs they be proved [l].

[l] Rogo filia, bona tua quandoque diſtribuas liberis tuis, ut quiſque de te meruerit —— ſufficiet, ſi non offenderint——eos ſolos non admitti qui offenderunt. *l. 77. §. 25. ff. de legat. 2. It muſt be proved, that they have failed in their duty.*

Si bonus miles antea æſtimatus fuit, prope eſt ut affirmationi ejus credatur. *l. 5. 8. 6. ff. de re milit.* Plerùmque credendum eſt, eum qui partis dominus eſt, jure potiùs ſuo re uti, quàm furti conſilium inire. *l. 51. ff. pro ſocio.*

Præſumptionem pro eo eſſe qui accepit, nemo dubitat. Qui enim ſolvit, numquàm ita reſupinus eſt ut facile ſuas pecunias jactet & indebitas effundat. *l. 25. ff. de probat.*

VIII.

8. It depends on the prudence of the Judge to diſcern the effect of Preſumptions.

It is by all theſe Rules which have been juſt now explained, that we are to judge of the uſe and effect of Preſumptions; that we are to diſtinguiſh in every caſe the quality of the Facts controverted, in order to judge which of them ought to be held as true, and which of them muſt be proved; and that we ought to diſtinguiſh thoſe Preſumptions which ought to be held as Proofs, from thoſe which ought not to have that effect. And it is on the prudence of the Judge, that the uſe and application of all theſe Rules does depend, according to the quality of the Facts, and the circumſtances [m], as will appear by the Examples explained in the Articles which follow.

[m] Ex ſententia animi tui te æſtimare oportet, quid aut credas, aut parùm probatum tibi opinaris. *l. 3. §. 2. in f. ff. de teſtib.* See the third Article.

IX.

9. Example of a Fact which it is neceſſary to prove.

If the Relation between a perſon deceaſed, and him who pretends to be his Heir at Law, or next of kin, were called in queſtion, this Relation would not be preſumed without proof. For it depends on Facts which are naturally unknown, if they are not proved. Thus, he whoſe Relation is not owned, ought to prove it [n].

[n] Quoties quæreretur genus vel gentem quis haberet, necne, eum probare oportet. *l. 1. ff. de probat.*

X.

10. Example of a Preſumption well grounded, that what has been paid was due.

If any perſon having made a payment to another, pretends that it is thro' miſtake that he has paid a thing which was not due, and that he who has received the payment maintains that what he has received was juſtly owing to him; it lies upon the perſon who has made the payment, to prove that he has paid a thing that was not due. For it is preſumed, that he has not been ſo imprudent as to pay what he did not owe. But if the perſon to whom the payment was made denied it, and aſſerted that he had received nothing, and it ſhould be proved that payment had been made to him; it would in that caſe lie upon him to prove that what he had received was juſtly owing to him. For his knavery in denying the payment, would render him ſuſpected of having received a thing that was not due to him [o].

[o] Cùm de indebito quæritur, quis probare debet, non fuiſſe debitum, res ità temperanda eſt, ut ſi quidem is qui accepiſſe dicitur rem, vel pecuniam indebitam, hoc negaverit, & ipſe qui debet legitimis probationibus ſolutionem approbaverit, ſine ulla diſtinctione ipſum qui negavit ſeſe pecuniam accepiſſe, ſi vult audiri, compellendum eſſe ad probationes præſtandas, quod pecuniam debitam accepit. Perenim abſurdum eſt, eum qui ab initio negavit pecuniam ſuſcepiſſe poſtquam fuerit convictus eam accepiſſe, probationem non debiti ab adverſario exigere. Sin verò ab initio confiteatur quidem ſuſcepiſſe pecunias, dicat autem non indebitas ei fuiſſe ſolutas, præſumptionem videlicet pro eo eſſe qui accepit, nemo dubitat. Qui enim ſolvit numquam reſupinus ita eſt, ut facile ſuas pecunias jactet, & indebitas effundat. Et maximè, ſi ipſe qui indebitas dediſſe

dediſſe dicit homo diligens eſt, & ſtudioſus pater-familias, cujus perſonam incredibile eſt in aliquo facile errâſſe. Et ideò eum qui dicit indebitas ſolviſſe, compelli ad probationem quòd per dolum accipientis, vel aliquam juſtam ignorantiæ cauſam, indebitum ab eo ſolutum eſt, & niſi hoc oſtenderit, nullam eum repetitionem habere. *l. 25. ff. de probat.*

XI.

11. *Another Example of many Accounts between two perſons.*

If two perſons having had many affairs together, have often made up their Accounts of what they might be reciprocally indebted the one to the other, and one of them after the death of the other, demands from the Heirs or Executors of the deceaſed, a Sum which he pretends to have advanced before all thoſe Accounts, and which he had never demanded, nor ſo much as taken any Note or Obligation for it, nor made any reſervation thereof in his Accounts; it will be preſumed, either that this Sum has never been due, or that it has been paid, or that the Creditor had remitted it. For if he had really been, or pretended to have been a Creditor, he would have reckoned that Sum in his Accounts, as well as other Debts; or he would have reſerved it, and would not have put off the demanding it, till after the death of the pretended Debtor, who might have been able to ſhew that he owed him nothing. And it would be the ſame thing if we ſuppoſe, inſtead of a Sum of Money, that the queſtion is concerning any other ſort of pretenſion, of which he had never made any demand, nor any reſervation; unleſs it were ſome Right, of ſuch a nature and ſo well grounded, as that the circumſtances ſhould make it appear that thoſe Accounts, and the delay of making the demand till after the death of the Debtor, ought to be of no prejudice thereto. Such as would be the Warranty againſt an Eviction, the caſe whereof did not fall out till after making up all thoſe Accounts, or ſome other Right of the like nature[p].

[p] Procula magnæ quantitatis fideicommiſſum à fratre ſibi debitum, poſt mortem ejus in ratione cum hæredibus compenſare vellet, ex diverſo autem allegaretur, numquam id à fratre, quamdiu vixit, deſideratum, cum variis ex cauſis, ſæpe in rationem fratris pecunias ratio Proculæ ſolviſſet. Divus Commodus, cùm ſuper eo negotio cognoſceret, non admiſit compenſationem: quaſi tacitè fratri fideicommiſſum fuiſſet remiſſum. *l. 26. ff. de probat.*

XII.

12. *Another Example, a Bond croſſed, or torn.*

If a Promiſory Note, or Bond, ſhould chance to be found in the hands of the Debtor, or if it had been croſſed, raſed, or torn in pieces, it would be a preſumption that it had been acquitted, or annulled, unleſs he who ſhould pretend to make uſe of it, had clear proofs that the debt was ſtill owing, and that the ſaid Note or Bond had been raſed, croſſed, or torn in pieces[q], or had fallen into the hands of the Debtor[r], only by ſome violence, or ſome accident, or other event which would deſtroy the preſumption that the debt was paid.

[q] Si chirographum cancellatum fuerit, licet præſumptione debitor liberatus eſſe videtur, in eam tamen quantitatem, quam manifeſtis probationibus creditor ſibi deberi adhuc oſtenderit, rectè debitor convenitur. *l. 24. ff. de probat.*

[r] Quod debitori tuo chirographum redditum contra voluntatem tuam aſſeveras, nihil de jure tuo deminutum eſt. Quibuſcunque itaque argumentis jure proditis, hanc obligationem tibi probanti, eum pro hujuſmodi facto liberationem minimè conſecutum, judex ad ſolutionem debiti jure compellet. *l. 15. C. de ſolut. & liberat. V. l. 1. C. de fide inſt.*

XIII.

13. *Example of a Preſumption that proves nothing.*

If a Tutor who had no Eſtate of his own, nor by his Wife, before he entred upon the Adminiſtration of his Tutorſhip, is found to have enriched himſelf during the Tutorſhip, the Minor cannot for that pretend that thoſe Goods are his, nor infer from thence that the Tutor has been unfaithful in his Adminiſtration, if otherwiſe he gives him in a true and juſt Account. For it may happen that the Tutor may have acquired thoſe Goods either by his labour and induſtry, or by other ways[s].

[s] Si defunctus tutelam veſtram adminiſtravit, non rerum ejus dominium vindicare, vel tenere potes: ſed tutelæ contra ejus ſucceſſores tibi competit actio. Debitum autem aliis indiciis comprobari oportet. Nam quòd neque ipſe, neque uxor ejus quicquam ante adminiſtrationem habuerunt, non idoneum hujus continet indicium. Nec enim pauperibus induſtria, vel augmentum patrimonii quod laboribus & multis caſibus quæritur, interdicendum eſt. l. 10. *C. arbitr. tutel.*

XIV.

14. *Example of a Preſumption in an antient Fact.*

When the queſtion is to prove an ancient Fact, of which there are no written Proofs, nor living Witneſſes, if the Fact be ſuch that it ought to be admitted to proof; as for inſtance, if the matter be to know how long an Eſtate has been in a Family, at what time a Work was made, or other Facts of the like nature; we receive the declarations which Witneſſes are able to make of what they have heard concerning the ſaid Facts, from other perſons who were then alive: and the proof which is drawn from thoſe declarations, is founded on this Preſumption, that the perſons whom the Witneſſes heard give an account of thoſe Facts, as notorious in their time, being dead before the proof

of

of the Facts was neceſſary, and nothing having obliged them to ſay any thing but the truth, the account therefore which they had given of the ſaid Facts is preſumed to be true[t].

[t] Idem Labeo ait, cùm quæritur an memoria extet facto opere, non diem & conſulem ad liquidum exquirendum, ſed ſufficere ſi quis ſciat factum: hoc eſt, ſi factum eſſe non ambigatur. Nec utique neceſſe eſt, ſupereſſe qui meminerint, verùm etiam, ſi qui audierunt eos, qui memoria tenuerint. *l.* 2. §. 8. *ff. de aqua. & aq. pluv. arc. l.* 28. *ff. de probat.*

XV.

15. A Preſumption of another nature than thoſe which ſerve for Proofs.

All the Rules which have been explained in the preceding Articles, concern Facts which are ſuch, as that either the truth of them may be proved, or that in default of proofs one may know preciſely by thoſe Rules what judgment to make of them. Thus, for Example, we ſee by theſe Principles, that there are Facts which paſs for true, altho' there be no proof of them, if the contrary Facts are not proved: That there are others which paſs for falſe, unleſs they are proved: That among Proofs and Preſumptions, ſome of them are certain, others uncertain: And that therefore in theſe ſorts of Facts Reaſon may always determine it ſelf to take one ſide, and to judge if we ought to hold a Fact for doubtful or for certain, for falſe, or for true. But there is another ſort of Facts, which are ſuch, that it is impoſſible to know the truth of the matter, and where nevertheleſs it is neceſſary to reſolve on taking one of the oppoſite Facts for true, altho' there be nothing but uncertainty both in the one and the other Fact, and that it may likewiſe very readily fall out that we take the falſe for the true. Thus, for Example, if a Father and his Son happen to be killed in a battle, or if both one and the other periſh in the ſame Shipwrack, ſo that there be no way to know if they both died at the ſame inſtant, or if one of them ſurvived the other, and which of the two: And that the Widow of the Father pretends that he died firſt, in order to make the Father's Inheritance to paſs to the Son, and ſo from the Son to her ſelf; the Collateral Relations, Heirs to the Father, pretending on the contrary, that the Father ſurvived the Son, or that they both died at the ſame inſtant of time, and that therefore ſeeing the Son could not ſucceed to the Father, they ſucceed to him: This queſtion cannot be decided, without ſuppoſing, either that the Father died firſt, and that the Son having ſucceeded to him, has tranſmitted to his Mother the Eſtate of his Father; or that the Son died firſt, and has tranſmitted to his Mother no part of his Father's Eſtate; or that they both died at the ſame inſtant of time, and that the Son not having ſurvived the Father, did not ſucceed to him; and that therefore the Inheritance of the Father goes to his Heirs. But ſeeing there is no way for determining which of theſe Events is the true one, the Law has directed that in ſuch a caſe, where it is neceſſary to take one ſide or other, and impoſſible to know the truth of the Fact on which the deciſion depends, it ſhall be preſumed, that the Father died firſt, and that the Son having ſucceeded to him, the Mother reaps the Inheritance of the Father in that of the Son[u]. And this Preſumption is founded, on one part, on the inclination to favour the Mother, and on the other part, on the Natural Order; according to which, the Son ought to out-live his Father. Thus, in this Event, where it remains uncertain what Nature has done, the Law ſuppoſes that Nature has done what it ſeems Reaſon would have deſired.

[u] Cum bello pater cum filio periſſet: materque filii, quaſi poſteà mortui, bona vindicaret, agnati verò patris, quaſi filius anteà periſſet: Divus Hadrianus credidit patrem prius mortuum. *l.* 9. §. 1. *ff. de reb. dub.*

The Queſtion concerning the Succeſſion of this Father and Son, is to be underſtood according to the written Law of the Romans, *or according to the Right which the Ordinances and Cuſtoms give to Mothers, in the Succeſſions of their Children.*

Altho' it be natural to preſume, in the caſe of this Article, and in others of the like nature, that the Son ſurvived his Father, and that in general the Children and Deſcendants outlive their Fathers and Mothers, and other Aſcendants; yet we find a contrary Preſumption in another Law, where it is ſaid; That if it had been agreed between a Father in Law and Son in Law, that if the Son in Law ſhould outlive his Wife, and ſhe leave behind her a Child of a year old, the Huſband ſhould have the Wife's whole Marriage Portion; and that if on the contrary the Child ſhould chance to die before the Mother, the Husband ſhould only retain a part of the ſaid Portion: and it had happened that the Mother and Child of a year old periſhed in a Shipwrack, it would be probable that the Child died firſt, and ſo the Husband would have only that ſhare of his Wife's Dowry which had been agreed on. Inter ſocerum & generum convenit: *ut, ſi filia mortua ſuperſtitem amiculum filium habuiſſet, dos ad virum pertineret: Quod ſi virente matre filius obiiſſet, vir dotis portionem, uxore in matrimonio defunctâ, retineret.* Mulier naufragio cum anniculo filio periit. Quia veriſimile videbatur, ante matrem, infantem periiſſe: virum partem dotis retinere placuit. *l.* 26. *ff. de pact. dot. This Preſumption, that in this caſe the Child died firſt, is founded on the weakneſs of its Age, which makes it to be judged, that the Child was leſs able to reſiſt, and that the Mother lived ſome time longer than the Child.*

XVI.

16. *Another kind of Presumption.*

There is yet another ſort of Preſumptions, which do not relate to Events or Facts of which it may be neceſſary to know the truth, as in all the Caſes which have been mentioned in the preceding Articles; but which regard the ſecret of the intention of perſons, when it is neceſſary to know the ſaid intention, and when there are no certain proofs of it. For in that caſe, it is neceſſary to diſcover it by Preſumptions, if there be any ſuch as may help us to find it out. Thus, for Example, if in the caſe of two perſons who bear the ſame Name, one of them is inſtituted Executor by a Teſtator, when in the Teſtament there was no certain deſcription by which it could be known, which of the two perſons the Teſtator meant to name for his Executor, one would judge of the intention of this Teſtator by the preſumptions which might diſcover it; ſuch as the ties of Relation and Friendſhip, which he might have only with one of the two; and by the other circumſtances which might diſcover which of the two he intended to name for his Executor [x].

[x] Quoties non apparet quis hæres inſtitutus ſit, inſtitutio non valet. Quippe evenire poteſt, ſi teſtator complures amicos eodem nomine habeat, & ad deſignationem nominis ſingulari nomine utatur: niſi ex aliis apertiſſimis probationibus fuerit revelatum, pro qua perſona teſtator ſenſerit. *l.* 62. §. 1. *ff. de hæred. inſt.* See the following Article, and the Remark on it.

XVII.

17. *Another ſort of Presumption.*

The uſe of the Preſumptions ſpoken of in the foregoing Article, reſpects the doubts, the obſcurities, the uncertainties of the intention of perſons, when it is not clearly enough explained. But there are ſome caſes, in which the Preſumptions are extended beyond what has been in the thought of the perſon whoſe will we want to know. Thus, for Example, if a Father having inſtituted his Son, and the Child of another Son already deceaſed, his Executors, and ſubſtituted the Son to the Grandſon, in caſe he ſhould die before he arrived at a certain age, it ſhould happen that this Grandſon dying before he attained the ſaid Age, leaves behind him Children; the Queſtion whether the Subſtitution ſhall take place to the prejudice of the Children of him who was charged with it, will be decided by this Preſumption, that the Teſtator did not mean to ſubſtitute, except in the caſe where his Grandſon ſhould die without Children, and that his intention could not be to call his Son to the Inheritance of his Grandſon who ſhould leave Children behind him [y].

[y] Cùm avus filium, ac nepotem ex altero filio, hæredes inſtituiſſet, à nepote petiit, ut *ſi intra annum trigeſimum moreretur, hæreditatem patruo ſuo reſtitueret.* Nepos, liberis relictis, intra ætatem ſuprafcriptam vitâ deceſſit, fideicommiſſi conditionem, conjectura pietatis, reſpondi defeciſſe. Quòd minus ſcriptum quàm dictum fuerat, inveniretur. *l.* 102. *ff. de condit. & demonſtr.*

It is to be remarked upon this and the preceding Article, that the uſe of theſe ſorts of Preſumptions, for diſcovering, or gueſſing at the intention of perſons, is very frequent in the interpretation of Contracts and Teſtaments, when it is neceſſary to interpret ſome ambiguity, or ſome obſcurity, and to judge of the intention of the perſons who make Covenants, or Teſtaments. And altho' this matter does not properly belong to this place, yet it is not altogether uſeleſs to diſtinguiſh here the ſeveral ſorts of Preſumptions, that we may the better underſtand their nature, and their different uſes. But we ought not to ſet down here the Rules of all theſe ſorts of Preſumptions, which may ſerve for the interpretation of Covenants and Teſtaments: for as to thoſe which concern Covenants, they have been explained in their proper places; and we ſhall explain in the Matter of Teſtaments, the Rules which have relation to them.

SECT. V.

Of the Interrogation and Confeſſion of the Parties.

Different ways of having the Confeſſion of a Party, as to Facts.

SEeing it often happens that he who has occaſion to prove a Fact that is conteſted, has neither Writing, nor Witneſſes, nor Preſumptions that may be ſufficient, one therefore in that caſe, has recourſe to draw from the Mouth of the Party, a Confeſſion of the truth; and that is done three ways. One is, without the intervention of an Oath, when one Party ſummons the other by ſome Act, and requires him to own the truth of a Fact, whether it be the ſame that is in diſpute, or ſome other that may ſerve to prove it; and this firſt way, which ought to be the only one, if every body acted always honeſtly and ſincerely, may have its effect, either when he who is ſummoned to declare the truth, is ſincere enough to own it, or when his want of ſincerity engages him to make ſuch Anſwers as that one may draw from them ſome advantages againſt him.

The ſecond way of having the Confeſſion of a Party, is by interrogating him on Facts that are pertinent; that is, which have relation to the diſpute in hand. And this hath its uſe in the caſes where

where he who wants to prove a Fact, having no Proofs thereof, and not being willing to refer it to the Oath of his Adverſary, demands that he be interrogated by the Judge, upon Facts, which he draws up in the form of a Libel, or Allegation, dividing it into ſeveral Articles, and inſerting therein the Fact in queſtion, and other Facts or Circumſtances which may have relation thereto, and ſerve to prove it. And if the Judge finds that the ſaid Facts, or Circumſtances, upon which it is deſired that the Party may be interrogated, may ſerve to prove the Fact in queſtion, he orders the Party to be interrogated, and to make Oath that he will ſpeak the truth of all that he knows concerning every one of the articles: and the Anſwers are taken down in writing; from which he who demanded them, draws the conſequences which may turn to his advantage, whether it be by the Confeſſions, or Denials, or Variations of the Party who has been interrogated.

The third manner of having the Confeſſion of a Party, is when he who cannot have Proofs of a Fact which he alledges, refers the matter to the Oath of his Adverſary, and conſents that the declaration which he ſhall make, after having been ſworn, ſhall be held for Truth, and ſerve as a Deciſion of the matter in diſpute: and this is called a Deciſive Oath.

This laſt manner of the Deciſive Oath, ſhall be explained in the following Section, and the others ſhall be the ſubject matter of the preſent.

We muſt not confound the Deciſive Oath of a Party, to which the matter in diſpute has been referred, with the Anſwers of thoſe who are appointed to be interrogated upon Facts alledged by their adverſe Party. For when the matter is referred to the Oath of the Party, the Oath decides for the perſon who makes it; but the Anſwers of the perſon who is interrogated upon Facts, do not decide in favour of him who anſwers, but ſerve only for drawing from his Anſwers, conſequences which may help to prove the Fact in queſtion: and do not hinder the effect of other Proofs that may be brought againſt him.

There is likewiſe another kind of Oath which the Judge ordains ſometimes by virtue of his Office, that is, of his own proper motion, even altho' it be not demanded by the Party, nor the deciſion of the Controverſy referred to it; and it depends on the prudence of the Judge to enjoin this Oath in the caſes where it may be proper. Thus, for Example, if he who demands a Sum of Money having made good his demand, the Defendant alledges that he has paid it, but does not prove the payment; the Judge may, in condemning the Defendant to make payment, require the Plaintiff to ſwear that he has not been already paid. Thus, in the Orders for admitting the Claims of Creditors, it is ordained, that the Creditors whoſe Claims are allowed of, ſhall make Oath, that the Sums for which they are ſet down as Creditors, are lawfully owing to them. And this is done to hinder the colluſion between Creditors who have been already paid, and the Debtor, who, that he might reap ſome profit thereby, ſhould conſent to their payment, to the prejudice of the lawful Creditors; and likewiſe to prevent other Frauds of Creditors, who make a bad uſe of the difficulties which occur in the ranking of Creditors, and in examining and ſtating all their Claims.

The CONTENTS.

1. *The Confeſſion of the Party ſerves for a Proof.*
2. *A Confeſſion through an Error in Fact.*
3. *Confeſſion through an Error in Law.*
4. *Interrogation of the Party ordered by the Judge.*
5. *How the Party who is interrogated ought to anſwer.*
6. *Uſe of Interrogations.*
7. *The Anſwer which is made through an error in Fact, does no harm.*
8. *Effect of Interrogations.*
9. *They do not hinder the effect of the other Proofs.*
10. *Difference between theſe Interrogations, and the demand of a ſight of the Writings belonging to one of the Parties.*

I.

1. *The Confeſſion of the Party, ſerves for a Proof.*

IF the Party againſt whom one has occaſion to prove a Fact in a Civil Cauſe, acknowledges himſelf that the Fact is true, that Acknowledgment will ſerve as a Proof, and will be a ſufficient ground for the Sentence of Condemnation which ought to follow thereupon. And ſuch a Confeſſion, if it is ſerious and poſitive, cannot be revoked, eſpecially if it has been made Judicially [a]; unleſs there were in the ſaid Confeſſion ſome Error which might be rectified, as ſhall be ſhewn in the following Article.

[a] Con-

[a] Confeſſus pro judicato eſt, qui quodammodo ſua ſententia damnatur. *l.* 1. *ff. de confeſſ. l.* 56. *ff. de re judic.*

Confeſſos in jure pro judicatis haberi placet. Quare ſine cauſa deſideras recedi à confeſſione tua, cùm & ſolvere cogaris.. *l. un. C. de confeſſ.*

In Capital Crimes, the Confeſſion of a Criminal is not enough to condemn him, if there be no other Proofs; becauſe it might ſo fall out, that ſuch a Confeſſion were only the effect of a trouble of mind, or of deſpair. V. l. 1. §. 17. &c. 27. ff. de Quæſtion.

II.

2. *A Confeſſion thro' an Error in Fact.*

He who through Error acknowledges a Fact to be true which is not ſo, may rectify the ſaid Error by proving the Truth which he was ignorant of [b].

[b] Non fatetur qui errat. *l.* 2. *ff. de confeſſ.*

III.

3. *Confeſſion thro' an Error in Law.*

If he who has owned the truth of a Fact, pretends to have owned it only by miſtake, upon pretext that out of ignorance of the Law he had made a Confeſſion contrary to his intereſt, he will not be allowed to revoke upon that pretence his Confeſſion [c]. Thus, for Example, if a Minor having borrowed Money, and being come of Age, gets himſelf relieved from his Obligation, but confeſſes that he employed the Money to diſcharge a debt that was due from his Father's Inheritance, he will not be admitted to revoke the ſaid Declaration, by ſaying that he made it only through miſtake, believing that by reaſon of his Minority he would nevertheleſs be diſcharged from his Obligation. For it was in point of Law that he erred, and not in matter of Fact; which does not alter the effect which his Confeſſion ought to have.

[c] Non fatetur qui errat, niſi jus ignoravit. *l.* 2. *ff. de confeſſ.*

IV.

4. *Interrogation of the Party ordered by the Judge.*

When one of the Parties demands that the other be interrogated upon Facts which he deduces into Articles; it depends on the prudence of the Judge to order the Party to be interrogated, if the Facts are ſuch, that the knowledge thereof may be of ſervice to decide the Queſtion that is to be determined; or not to order it, if the Facts have no relation to the Queſtion in diſpute [d].

[d] Ubicumque judicem æquitas moverit: æquè oportere fieri interrogationem, dubium non eſt. *l.* 21. *ff. de interrogat.*

By the Ordinances of France, it is lawful for the Parties to demand, that the adverſe Party be examined upon Interrogatories in all the ſteps of the Cauſe, touching Facts and Articles that are relevant, that is to ſay, that may ſerve for the proof of the Fact in queſtion: and they are interrogated upon Oath. See the Ordinance of 1539. Art. 37. and the following Articles; the Ordinance of 1563. Art. 6. and that of 1667. Title 10. Art. 1. See the eighth Article of the firſt Section.

[*This practice of obliging the Parties, at the mutual requeſt of each other, to anſwer upon Oath to Facts which are admitted as pertinent to the Cauſe depending, is ſtill obſerved in all the Eccleſiaſtical Courts, and in the High Court of Admiralty of* England. *Only with this reſtriction, that no perſon is obliged to anſwer upon Oath to any criminous Poſition or Fact, whereby he may be liable to any Cenſure or Puniſhment.* Clarke Praxis in Curiis Eccleſiaſticis. Tit. 55. 56. Clarke Praxis Curiæ Admiralitatis Angliæ, Tit. 18. 22. Stat. 13. Car. II. cap. 12. §. 4.]

V.

5. *How the Party who is interrogated ought to anſwer.*

He whom the Judge has directed to be interrogated, is obliged to anſwer, and to declare clearly and preciſely what he knows of the Facts concerning which he is interrogated, without feigning or diſſembling, and without ambiguity or obſcurity; ſo as that he explain himſelf diſtinctly as to each particular Fact, that his Anſwers be ſincere and natural, and that they quadrate exactly with the queſtion that is put to him [e].

[e] Nihil intereſt, neget quis, an taceat interrogatus, an obſcurè reſpondeat, ut incertum dimittat interrogatorem. *l.* 11. §. 7. *ff. de interrog.*

In totum confeſſiones ita ratæ ſunt, ſi id quod in confeſſionem venit, & jus & naturam recipere poteſt. *l.* 14. §. 1. *eod.*

Quod ait prætor *omnino non reſpondiſſe* poſteriores ſic exceperunt, ut omnino non reſpondiſſe videatur qui ad interrogatum non reſpondit, id eſt, πρὸς ἐπερώτησιν. *l.* 11. §. 5. *eod.*

See the Ordinances quoted on the preceding Article.

VI.

6. *Uſe of Interrogations.*

The uſe of theſe ſorts of Interrogations, is not only to have thereby proof of the Facts which the perſon who is interrogated ſhall own to be true; but altho' he ſhould deny or conceal the truth, yet the Interrogations may help to diſcover it by the conſequences which may be drawn againſt him from all his Anſwers. As if he denies Facts which he knows, and which are certain: if he alledges any Facts which are known to be falſe: if he varies and wavers in his Anſwers: or if he owns Facts from which one may infer the truth of thoſe which he has denied [f].

[f] Voluit prætor adſtringere eum qui convenitur ex ſua in judicio reſponſione, ut vel confitendo, vel mentiendo, ſeſe oneret. *l.* 4. *ff. de interrogat.*

VII.

7. *The Anſwer which is made through an Error in Fact, does no harm.*

If it happens that he who has been interrogated, diſcovers that through miſtake he has owned ſome fact which was not true, or that he has been miſtaken in the circumſtances, and that having found out the truth, he can

make it appear that he was miſtaken; his confeſſion can be of no prejudice to the Truth which ſhall otherwiſe appear [g].

[g] Celſus ſcribit, licere reſponſi pœnitere, ſi nulla captio ex ejus pœnitentia ſit, actoris. Quod veriſſimum mihi videtur, maximè ſi quis poſtea plenius inſtructus quid faciat inſtrumentis, vel epiſtolis amicorum, juris ſui edoctus. *l.* 11. §. *ult. ff. de interrog.*

VIII.

8. Effect of Interrogations.

If he who has been interrogated, has owned the truth of the Facts conteſted, or if it may be gathered from his Anſwers; his Interrogation will have the ſame effect, as if he had conſented to the Sentence which condemns him to pay what is demanded of him, if the ſaid Condemnation be founded on the Proofs which reſult from his Anſwers [h].

[h] Qui interrogatus reſponderit, ſic tenetur, quaſi ex contractu obligatus, pro quo puniatur, dum ab adverſario interrogatur. Sed & ſi à prætore fuerit interrogatus, nihil facit prætoris auctoritas: ſed ipſius reſponſum, ſive mendacium. *l.* 11. §. 9. *ff. de interrog.*

IX.

9. They do not hinder the effect of the other Proofs.

The Anſwers made by thoſe whom the Judge has ordered to be interrogated upon Facts alledged by their adverſe Parties, are not deciſive in their favour: and what they anſwer does not ſerve as a Proof for them, neither does it hinder the effect of the contrary Proofs. But the effect which the ſaid Anſwers ought to have in diſcovering the truth of the Facts in queſtion, depends on the Prudence of the Judge [i].

[i] *See the Law cited on the ſixth Article.*

X.

10. Difference between theſe Interrogations, and the demand of a ſight of the Writings belonging to one of the Parties.

We may place in the ſame rank with the Confeſſions of Parties, that which may reſult from the Deeds or Writings which one Party demands a ſight of from the other, ſuch as his Journal, or other Writing, if it be exhibited by the Party of whom it is demanded. But there is this difference between a demand of the ſight of the Deeds and Writings belonging to a Party who does not exhibit them in Court, and that of Anſwers to Interrogatories; that one may refuſe to produce Papers if he himſelf does not make uſe of them, but one cannot refuſe to anſwer to Facts that are pertinent. For the Parties ought to know the truth of all the Facts, whereof the knowledge is neceſſary for determining what is in diſpute. And this knowledge ought to be common to all the perſons who have an intereſt therein. But Journals, and other Papers which belong only to one Party, are not common both to the one and the other. And theſe Papers may chance to contain Facts which ought to be kept ſecret, and which perhaps have no relation to the matter in diſpute. Thus, one Party cannot demand of the other, to produce or communicate a Writing of which the ſaid Party does not offer to make any uſe himſelf: but it depends upon his own honeſty and integrity to produce or keep up the Writings whereof the ſight is demanded. And one is obliged to produce only thoſe Writings on which he grounds his Right. But if the Refuſal to produce any Paper ſhould give juſt ground to ſuſpect ſome unfair dealing, as if a Creditor who demands Intereſt for a Sum of Money, or Arrears of a Rent, ſhould refuſe to produce his Journal, or Day-Book, in which the Debtor pretends that the payment of what is demanded is marked down; it would depend on the prudence of the Judge to give ſuch orders upon the ſaid refuſal, as the circumſtances might require [l].

[l] Edenda ſunt omnia quæ quis apud judicem editurus eſt: non tamen ut & inſtrumenta, quibus quis uſurus non eſt, compellatur edere. *l.* 1. §. 3. *ff. de edendo.*

Ipſe diſpice, quemadmodum pecuniam, quam te depoſuiſſe dicis deberi tibi probes. Nam quod deſideras, ut rationes ſuas adverſaria tua exhibeat, id ex cauſâ ad judicis officium pertinere ſolet. *l.* 1. *C. eod.*

Non eſt novum, eum à quo petitur pecunia, implorare rationes creditoris, ut fides veri conſtare poſſit. *l.* 5. *C. eod.*

Et quæ à Divo Antonino patre meo, & quæ à me reſcripta ſunt, cum juris & æquitatis rationibus congruunt. Nec enim diverſa ſunt vel diſcrepantia. Quòd multum interſit an ex parte ejus qui aliquid petit, quique doli exceptione ſubmoveri ab intentione petitionis ſuæ poteſt, rationes promi reus deſideret, quibus ſe poſſe inſtrui contendit, quod utique ipſa æquitas ſuadet: an verò ab eo, à quo aliquid petitur actor deſideret rationes exhiberi, quando hoc caſu non oportet originem petitionis ex inſtrumentis ejus, qui convenitur fundari. *l.* 8. *eod.*

What is ſaid in this Article concerning the production of Papers, reſpects only thoſe Papers which are in the hands of particular perſons, and which are their own property, and has no Relation to Publick Notaries, Regiſters, and other Publick Perſons and their Heirs, or others who are Depoſitaries of Minutes, and other Writings, which have been committed to their Charge. For theſe ſorts of Perſons exerciſing a publick Function, are bound to produce the Deeds or Writings which have been depoſited in their hands, to the perſons who are intereſted in them, even altho' it were againſt themſelves; and if they refuſe to produce them, they are compelled to do it by the Judges. Is apud quem res agitur, acta publica tam civilia, quam criminalia exhiberi inſpicienda, ad inveſtigandam veritatis fidem jubebit. *l.* 2, *C. de edendo.* Argentarius rationes edere jubetur, nec intereſt, cum ipſo argentario controverſia ſit an cum alio. *l.* 10. *ff. eod.* Cogentur & ſucceſſores argentarii edere rationes. *l.* 6. §. 1. *eod.*

SECT.

SECT. VI.

Of an Oath.

Diverſe uſes of an Oath.

AN Oath is a Security which the Laws require on ſeveral occaſions, either to corroborate an Engagement, or to confirm an Evidence, or Declaration touching the truth of a matter of fact; and this Security conſiſts in the confidence that one may have, that he who ſwears will not violate a duty, where he takes God to witneſs for his fidelity in what he declares, or in what he promiſes, and to be the Judge and Avenger of his infidelity, if he is guilty of perjury[a]. Thus, the Laws require, that perſons who enter upon Publick Offices ſhall make Oath, that they will execute them according to the Rules preſcribed to them. Thus they oblige Tutors, Curators, and other Adminiſtrators, to ſwear that they will faithfully perform the duties of their Function. Thus they appoint thoſe who are called upon to bear witneſs in a Court of Juſtice, or to make a Judicial Report of things within their knowledge, ſuch as perſons ſkilled in ſome Art or Profeſſion, to ſwear that they will give a true Teſtimony, or make a faithful Report. Thus when one of the Parties not being able to prove a Fact which he advances, refers it to the Oath of his adverſe Party, or that the Judge refers the matter to the Oath of the Party, he whoſe Oath is deſired, whether it be by the Judge, or by the adverſe Party, is bound to ſwear to what may be within his knowledge, and may ſerve to decide the matter in diſpute.

[a] The Lord be a true and faithful witneſs between us. *Jerem.* xlii. 5. Even I know, and am a witneſs, ſaith the Lord. *Jerem.* xxix. 23.

The uſe of an Oath on theſe and all other occaſions, has been invented as a precaution againſt the inconſtancy and infidelity of Mankind, and to ſupply, by the firmneſs of ſo ſtrict a Tie of Religion, the want of other Aſſurances, which he whoſe Oath is taken cannot give, or which it would not be juſt to require of him. Thus one cannot have any other ſecurity from a Witneſs that he will ſpeak the truth, than what may be had from his Oath, that he will be ſincere and upright in his declaration, and from the probability that he would not wilfully be guilty of perjury. Thus, it would neither be juſt, nor decent, to require of an Officer of Juſtice, that he ſhould give Surety for his faithful diſcharge of his Office, nor any other Security beſides that of his Oath.

An Oath being a precaution that is eaſy to be taken, and it being a corroboration of the Engagement of the perſon who ſwears; the uſe of an Oath has been ſo far extended, that it has been made uſe of even in bare Covenants between particular perſons, the one ſwearing to the other that he would execute what he had promiſed: and we ſtill ſee, that in Obligations and in Contracts, the Notaries make mention of this Oath. But ſeeing this was a ſuperfluous precaution, and an occaſion of Perjury, this uſage is aboliſhed, and the Parties contracting take no Oath, altho' mention be made thereof in Obligations and Contracts. There is likewiſe gone into diſuſe another ſort of Oath, which the *Roman* Laws required of all perſons engaged in any Law-Suit, obliging both Plaintiffs and Defendants, at the beginning of the Cauſe, to ſwear that their demands and their defences were ſincere and upright, without any intention to give unneceſſary trouble, or to uſe querks and cavils[b]. And this uſually ſerved to no other purpoſe, than to be an occaſion of Perjury either to the one Party or the other, or ſometimes even to both. And altho' this Oath had been renewed in *France*, by the Ordinances, in ſome caſes[c]; yet at preſent it is altogether diſuſed, and no mention made of it.

[b] *L. 2. Cod. de jur. prop. cal. dand.*

[c] *By an Ordinance of* Philip the Fair, *in the year 1302, the King's Proctors were obliged to take this Oath in the Cauſes which they commenced for the King's intereſt. And by the fifty eighth Article of the Ordinance of* Orleans, *in all Civil Cauſes the Parties were obliged to take this Oath.*

[*This Oath of Calumny is ſtill practiſed in the Eccleſiaſtical Courts, and Court of Admiralty of* England, *whenever it is inſiſted on by the Parties; who may either in the beginning of the Cauſe, or at any time afterwards, demand that their adverſe Party may be obliged to take this Oath, in order to clear themſelves from all ſuſpicion of carrying on the Suit out of a ſpirit of vexation and contradiction.* Clarke Praxis in Cur. Eccleſ. Tit. 151. Clarke Praxis Curiæ Admir. Angl. Tit. 42.]

Of all the ſorts of Oaths which have been juſt now mentioned, we may imagine two uſes, which make as it were two kinds of Oaths. One is of the Oath which is uſed to enforce and corroborate an Engagement; and the other is of that which is taken by one of the Parties in default of Proofs, whether the Oath be tendered by the adverſe

Party,

Party, or enjoined by the Judge. Thus the Oath of Publick Officers, of Tutors, Curators, and others who are made to ſwear that they will faithfully diſcharge their Functions; that taken by Witneſſes, and by perſons ſkilled in ſome Art or Profeſſion, are in order to fortify and corroborate their engagements to diſcharge faithfully their Offices and Functions, to ſpeak the truth, to make a faithful Report: and all theſe Oaths relate to future duties. But as to the Oath which is tendered to one of the Parties, altho' it ought to have, with regard to him who makes it, the effect of enforcing his engagement to ſpeak the truth, yet it is under another view that it is conſidered as holding the place of a Proof, which makes the Fact to which he ſwears to be held for a Truth. And it is under this view that this ſort of Oath is a matter which belongs to the Title of Proofs, the Rules whereof ſhall be explained in this Section; whereas the other Oaths do not make a Matter which contains a detail of Rules, but they are reduced to theſe few Remarks which we have juſt now made on this Subject.

The CONTENTS.

1. *Definition of an Oath, and its Uſe.*
2. *The Oath is not taken, unleſs it be directed.*
3. *How a matter is referred to the Oath of the Party.*
4. *The Judge may order the Oath without the deſire of the Party, if there be occaſion.*
5. *The Party's refuſing to ſwear, paſſes for a proof.*
6. *The Oath referred back again to the perſon who firſt deſired it of his adverſe Party.*
7. *He who has deſired his Adverſary's Oath, may excuſe him from ſwearing.*
8. *He may likewiſe revoke his conſent to refer the matter to his Adverſary's Oath.*
9. *The duty of the Judge in relation to the Oath that is tendred by one of the Parties to the other, or referred back again to him who firſt tendred it.*
10. *The Oath decides the controverſy.*
11. *The Oath extinguiſhes the Action.*
12. *When a Writing is diſcovered after Oath has been made.*
13. *In what matters this Oath of the Party is uſed.*
14. *Effect of the Oath with reſpect to perſons intereſted with the Parties.*
15. *The Oath neither benefits nor hurts third perſons.*
16. *What perſons may refer the matter in diſpute to the Oath of the Party, for others.*

I.

AN Oath is an Act of Religion, by which he who ſwears, calls upon God to be Witneſs of his fidelity in what he promiſes, or to be Judge and Avenger of his infidelity, if he fails therein [a]. Thus an Officer makes Oath, that he will faithfully execute his Office: Thus a Witneſs promiſes and ſwears, that he will ſpeak the truth: Thus he to whoſe Oath a matter in diſpute is referred that he may be Judge in his own Cauſe, promiſes to tell the truth ſo far as he knows of the matter. *1. Definition of an Oath, and its Uſe.*

[a] Jurisjurandi contempta religio ſatis Deum ultorem habet. *l.* 2. *C. de reb. cred & jurej.*

II.

As a Party is never made to ſwear in his own Cauſe, except where there is a deficiency of Proof; ſo no body is admitted to ſwear, unleſs the Oath be tendred to him, and directed by the Judge, who is to enquire whether the Proofs be ſufficient, or if it be neceſſary to have recourſe to the Oath of the Party [b]. *2. The Oath is not taken, unleſs it be directed.*

[b] Si reus juraverit nemine ei jusjurandum deferente, prætor id, jusjurandum non tuebitur, ſibi enim juravit. Alioquin facillimus quiſque ad juſjurandum decurrens, neminem ſibi deferente jusjurandum, oneribus actionum ſe liberabit. *l.* 3. *ff. de jurejurando.* See in the following Article the manner how a matter in diſpute is referred to the Oath of the Party, and how the Oath is enjoined by the Judge.

III.

The Party who finds that he has no proofs at all, or that he has not proofs ſufficient, may refer the matter to the Oath of his Adverſary; that is, ſubmit to whatever he ſhall declare touching the matter, after he has been ſworn. And this Oath, which the Judge directs and admits, if there be occaſion, is often practiſed, and is uſeful for putting an end to Law-Suits [c]. *3. How a matter is referred to the Oath of the Party.*

[c] Maximum remedium expediendarum litium in uſum venit jurisjurandi religio. Qua vel ex pactione ipſorum litigatorum, vel ex auctoritate judicis decidantur controverſiæ. *l.* 1. *ff. de jurejur.* See the following Article.

IV.

Altho' the Party who is deſtitute of Proofs ſhould not declare that he refers the matter to the Oath of his Adverſary; yet the Judge may order the Oath to be taken, *4. The Judge may order the Oath, without the de-*

ſive of the Party, if there be occaſion.

taken, if he finds it reaſonable. Thus, for inſtance, if a Debtor from whom a Creditor demands a Sum of Money due by Bond, which he proves, alledges that he has paid it, but does not prove the payment, alledging only ſome circumſtances which are not ſufficient to diſcharge him from the demand; the Judge may in condemning the Debtor to pay the debt, oblige the Creditor to ſwear that he has not received payment of it [d].

[d] Ex auctoritate judicis. *See the Law quoted on the preceding Article.*

In bonæ fidei contractibus, nec non in cæteris cauſis, inopia probationum per judicem jurejurando causâ cognitâ res decidi oportet. *l.* 3. *C. de reb. cred. & jurejur.*

V.

5. The Party's refuſing to ſwear, paſſes for a Proof.

He to whoſe Oath his adverſe Party refers a matter of Fact that is within his knowledge, is obliged to ſwear, if the Judge requires it: and if he refuſes to do it, the Fact will be held as proved and confeſſed, in order to found the Sentence of Condemnation which ought to follow thereupon. Thus, for Example, if he who pretends to be Creditor in a Sum of Money, for which he ſays that he either had no Bond at all, by reaſon of the ſmallneſs of the Sum, or that the Bond is loſt, and he not having ſufficient proof of the debt, declares that he is willing to refer the matter to the Oath of the perſon whom he calls his Debtor, and who denies the debt: the Debtor will be obliged to ſwear that he owes him nothing, and if he refuſes to do it, the Fact will be held for true, and he will be condemned to pay the Sum that was demanded [e].

[e] Ait prætor, *eum à quo jusjurandum petetur, ſolvere, aut jurare cogam.* Alterum itaque eligat reus, aut ſolvat, aut juret: ſi non jurat, ſolvere cogendus erit à Prætore. *l.* 34. §. 6. *ff. de jurej.*

VI.

6. The Oath referred back again to the perſon who firſt deſired it of his adverſe Party.

If the Fact which one Party refers to the Oath of the other be within the knowledge of both, he to whoſe Oath the matter has been referred, has the liberty either to ſwear, or to refer the matter back again to the Oath of the perſon who deſired his. And if he ſhould refuſe to do either the one or the other, the Fact would be reputed as proved and confeſſed, and he would be condemned to what ſhould be the conſequence of the proof of the ſad Fact [f].

[f] Datur autem & alia facultas reo, ut ſi malit referat jusjurandum: & ſi is qui petet conditione jurisjurandi non utetur judicium ei prætor non dabit. Æquiſſimè enim hoc facit, cùm non deberet diſpliacere conditio jurisjurandi ei qui detulit. *l.* 34. §. 7. *ff. de jurejur.*

Manifeſtæ turpitudinis, & confeſſionis eſt nolle nec jurare, nec jusjurandum referre. *l.* 38. *ff. eod.*

Delata conditione jurisjurandi, reus —— ſolvere vel jurare, niſi referat jusjurandum, neceſſe habet. *l.* 9. *C. de reb. cred. & jurejur.*

VII.

7. He who has deſired his Adverſary's Oath, may excuſe him from ſwearing.

The perſon whoſe Oath was deſired, being ready to ſwear, the Party who deſired it, may excuſe him from it. And in this caſe, it will be the ſame thing as if the Oath had been actually made [g].

[g] Remittit jusjurandum qui, deferente ſe, cùm paratus eſſet adverſarius jurare, gratiam ei fecit, contentus voluntate ſuſcepti jurisjurandi. *l.* 6. *ff. de jurejur.*

VIII.

8. He may likewiſe revoke his conſent to refer the matter to his Adverſary's Oath.

He who has referred the matter to the Oath of his adverſe Party, may recal that conſent, if his Adverſary has not as yet ſworn. For it may happen, either that he has found new Proofs, or that he has reaſon to fear a falſe Oath [h].

[h] Quòd ſi non ſuſcepit jusjurandum (is cui delatum erat licet) poſtea parato jurare actor nolit deferre, non videbitur remiſſum. Nam quod ſuſceptum eſt, remitti debet. *l.* 6. *in f. ff. de jurejur.*

IX.

9. The duty of the Judge in relation to the Oath that is tendred by one of the Parties to the other, or referred back again to him who firſt tendred it.

It follows from all the preceding Rules, that when the matter is concerning an Oath, whether it be that one Party tenders it to the other, or that he to whom it is tendred, deſires to refer it back again to his Adverſary; it depends on the prudence of the Judge, according to the circumſtances of the quality of the Facts, and the knowledge which the perſon whoſe Oath is deſired may have of them, to direct it, or not: And altho' the Oath be not demanded by the Party, yet the Judge may enjoin it by vertue of his Office, if there be occaſion. And after the Oath has been directed, if it has been at the deſire of one of the Parties, the duty of the Judge is, to take the Oath of the Party who has been deſired to give it, and to decree what ought to be adjudged in conſequence of his Oath, whether it be that he ſhould have what he demands, or that he ſhould be diſmiſſed from the Demand that is brought againſt him. But if he ſhould refuſe to ſwear, when he is made Judge in his own Cauſe, he will be either caſt in his own demand, or condemned to pay what is demanded of him. And as to him who had referred the matter to his Adverſary's Oath, and to whoſe Oath his Adverſary refers it back again, if he has juſt reaſons for not ſwearing, as if the Facts were not within

within his knowledge, he ought not to be conſtrained to ſwear. But if he refuſes to make Oath touching a Fact that is within his knowledge, it will be held as proved: And the Judge will decree what ſhall be juſt according to the ſaid Fact. But if he ſwears, Judgment will be given according to his Oath [i].

[i] Non ſemper autem conſonans eſt per omnia referri jusjurandum quale defertur, forſitan ex diverſitate rerum, vel perſonarum: quibuſdam emergentibus quæ varietatem inducunt. Ideoque, ſi quid tale inciderit, officio judicis conceptio hujuſcemodi jurisjurandi terminetur. *l.* 34. §. 8. *ff. de jurejur.*

Cùm res in jusjurandum demiſſa ſit, judex jurantem abſolvit: referentem audiet, & ſi actor juret condemnet reum. Nolentem jurare reum, ſi ſolvat abſolvit: non ſolventem condemnat. Ex relatione non jurante actore, abſolvit reum. *d. l.* 34. §. *ult.*

X.

10. *The Oath decides the controverſy.*

When one of the Parties has referred the matter to his Adverſary's Oath, and he has ſworn, his Oath will be deciſive; and what he ſhall have declared upon Oath will be held for Truth, and will ſerve as a Rule. For it was to decide the Controverſy, that his Oath was deſired. Thus, it will have as much or more force than a Thing that is adjudged: and will have the ſame effect as a Payment, if he of whom a Sum of Money was demanded, ſwears that he owes nothing; or as a Tranſaction, if it was a diſpute of another nature [l].

[l] Jusjurandum ſpeciem tranſactionis continet: majoremque habet auctoritatem, quàm res judicata. *l.* 2. *ff. de jurejur.*

Dato jurejurando, non aliud quæritur quàm an juratum ſit: remiſſa quæſtione an debeatur: quaſi ſatis probatum ſit jurejurando. *l.* 5. §. 2. *eod. l.* 56. *ff. de re jud.*

Jusjurandum etiam loco ſolutionis cedit. *l.* 27. *ff. de jurejur.* Eſt acceptilationi ſimile. *l.* 40. *eod.*

XI.

11. *The Oath extinguiſhes the Action.*

The deciſion of an Oath puts an end to all other queſtions, except that of knowing what has been ſworn. And it hath this effect, that it extinguiſhes the Right of the Party who referred it to his Adverſary's Oath. For if it was the Plaintiff, his demand is annulled both in reſpect to himſelf, and alſo in reſpect to thoſe who repreſent him. And if it was the Defendant, he is debarred from making any defence, and the Plaintiff's Action remains eſtabliſhed and proved both againſt the Defendant, and againſt all thoſe who ſucceed in his room. And it would be the ſame thing, if the perſon whoſe Oath had been deſired by the contrary Party, being ready to ſwear, had been excuſed from it, his Adverſary having diſpenſed with his ſwearing [m].

[m] De eo quod juratum eſt (prætor) pollicetur ſe actionem non daturum, neque in eum qui juravit, neque in eos qui in locum ejus, cui jusjurandum delatum eſt, ſuccedunt. *l.* 7. *in f. ff. de jurejur.*

Jurejurando dato, vel remiſſo, reus quidem acquirit exceptionem ſibi, aliiſque: actor verò actionem acquirit, in qua hoc ſolum quæritur, an juraverit, dari ſibi oportere: vel cùm jurare paratus eſſet, jusjurandum ei remiſſum ſit. *l.* 9. §. 1. *ff. eod.*

XII.

12. *When a Writing is diſcovered after Oath has been made.*

If after Oath has been made, there be found Writings which prove the contrary of what has been ſworn; theſe new Proofs will deſtroy the effect of the Oath, and will re-eſtabliſh the Right of the other Party. And this Proof, which is readily received when the Oath has been directed only by the Judge, and not at the inſtance of the Party, may alſo be received, altho' the Oath have been made at the deſire of the Party himſelf, if the quality of the Fact, and the evidence of the Proof, make it reaſonable that it ſhould be ſo. As, for Example, if he from whom a Sum of Money is demanded by vertue of a Teſtament, of a Contract, or of another Title which is not produced and proved, acknowledges the truth of the Title which happens to be loſt or miſlaid, but being ignorant whether it makes mention of what is demanded of him, refers the matter to the Oath of the Plaintiff, and having paid him after he had made Oath, the Title appears, and nothing is found in it which could oblige him to make payment of what is demanded, he may recover what he has paid upon account of this falſe Oath [n].

[n] Admonendi ſumus interdum etiam poſt jusjurandum exactum permitti conſtitutionibus Principum, ex integro cauſam agere ſi quis nova inſtrumenta ſe inveniſſe dicat, quibus nunc ſolis uſurus ſit. Sed hæ conſtitutiones tunc videntur locum habere, cùm à judice aliquis abſolutus fuerit. Solent enim ſæpe judices in dubiis cauſis, exacto jurejurando ſecundùm eum judicare, qui juraverit. Quòd ſi aliàs inter ipſos jurejurando tranſactum ſit negotium, non conceditur eandem cauſam retractare. *l.* 31. *ff. de jurejur.*

Cauſa jurejurando ex conſenſu utriuſque partis, vel adverſario inferente delato & præſtito, vel remiſſo, deciſa, nec perjurii prætextu retractari poteſt: niſi ſpecialiter hoc lege excipiatur. *l.* 1. *C. de reb. cred. & jurejur.*

Cùm quis legatum vel fideicommiſſum, utpote ſibi relictum exigeret, & teſtamento forte non apparente, pro eo ſacramentum ei ab hærede delatum eſſet, & his religionem ſuam præſtâſſet, affirmans ſibi legatum vel fideicommiſſum derelictum eſſe, & ex hujuſmodi teſtamento id quod petebat conſecutus eſſet, poſtea autem manifeſtum eſſet factum, nihil ei penitùs fuiſſe derelictum: apud antiquos quærebatur utrùm jurejurando ſtandum eſſet, an reſtituere deberet, quod accepiſſet——nobis itaque melius viſum eſt repeti ab eo legatum vel fideicommiſſum, nullumque ex hujuſmodi perjurio ei lucrum accedere. *l. ult. C. de reb. cred. & jurejur.*

Ne cui ex delicto impium ſibi lucrum afferre noſtris legibus concedatur. *d. l. in f.*

XIII.

13. *In what matters this Oath of the Party is uſed.*

All that has been ſaid of an Oath in the foregoing Articles, is to be underſtood of all the caſes which may happen in all Civil Matters, when the Facts and the Circumſtances may render the uſe of an Oath juſt and decent [o]. But in Crimes, the Accuſer cannot put the party accuſed upon his Oath, nor can the Accuſed oblige the Accuſer to ſwear; neither can the Judge refer the matter to the Oath of either of them. For it would be contrary to Juſtice and to Good Manners, that the Acquittal, or Condemnation of the Party accuſed ſhould depend on an Oath, which Intereſt or Paſſion might influence contrary to Truth, or that it ſhould depend on any other cauſe beſides that of a full Proof of the Truth.

[o] Quacumque actione quis conveniatur, ſi juraverit, proficiet ei jurejurandum, ſive in perſonam, ſive in rem, ſive in factum, ſive pœnali actione, vel quavis alia agatur, ſive de interdicto. *l.* 3. §. 1. *ff. de jurejur.*

XIV.

14. *Effect of the Oath with reſpect to perſons intereſted with the Parties.*

If in a Cauſe decided by the Oath of the Party, he who has ſworn, or he who has referred the matter to his Adverſary's Oath, be intereſted with others for the whole debt, ſo as that any one of them alone may diſcharge the whole, or be compelled to pay the whole debt; altho' one of them only has been in Judgment, yet the Oath will have its effect with reſpect to them all, either for or againſt them [p].

[p] In duobus reis ſtipulandi ab altero delatum jusjurandum etiam alteri nocebit. *l.* 28. *ff. de jurejur.* Ex duobus reis promittendi ejuſdem pecuniæ, alter juravit: alteri quoque prodeſſe debebit. *d. l.* 28. §. 3. See the following Article.

XV.

15. *The Oath neither benefits, nor hurts third perſons.*

The Deciſion made by the Oath of the Party reſpects only the Parties between whom the Oath has been ordained, or thoſe whoſe Right is in their hands, or their Sureties, and the perſons who repreſent them; but it cannot hurt third perſons. Thus, for Example, he to whoſe Oath the matter had been referred, in a demand of a Thing which he pretended did belong to him, and who had ſworn that it was his, could not plead this Oath againſt another perſon who ſhould claim a Right to the ſame Thing [q].

[q] Jusjurandum alteri neque prodeſt, neque nocet. *l.* 3. §. 3. *in fine ff. de jurejur.*

Si petitor juravit poſſeſſore deferente, *rem ſuam eſſe*, actori dabitur actio. Sed hoc duntaxat adversùs eum, qui jusjurandum detulit, eoſque qui in ejus locum ſucceſſerunt.

Cæterum adversùs alium, ſi velit prærogativa jurisjurandi uti, nihil ei proderit. Quia non debet alii nocere, quod inter alios actum eſſet. *l.* 9. §. *ult. & l.* 10. *eod.*

See touching Sureties, the fifth Article of the fifth Section of the Title of Sureties.

XVI.

16. *What perſons may refer the matter in diſpute to the Oath of the Party, for others.*

It is only the perſons intereſted who can refer the matter in diſpute to the Oath of the Party, and thoſe who have a right to do it in the name of others, whether it be by the Authority of Law, as a Tutor, and Guardian; or by the will of the Party concerned, as a Proxy. But the Tutor, and Proxy, cannot refer the matter to the Oath of the Party, unleſs they obſerve the Rules which have been explained in their proper place [r].

[r] *See the fifth Article of the ſecond Section of Tutors, and the tenth Article of the third Section of Proxies. See alſo the eighth Article of the firſt Section of that which is done to defraud Creditors.*

TITLE VII.

Of POSSESSION and PRESCRIPTION.

Why Poſſeſſion and Preſcription are here joined together.

WE have joined together under the ſame Title the matter of Poſſeſſion, and that of Preſcriptions, becauſe it is by Poſſeſſion that Preſcription is acquired; ſo that one is as it were the Cauſe, and the other the Effect: And likewiſe for this reaſon, that both the one and the other are ways of acquiring and aſcertaining the Property of Things. For it will appear in this Title, that not only is the Property of a Thing acquired by Preſcription, which is in effect nothing elſe but a Poſſeſſion continued for a long time, but that it is likewiſe ſometimes acquired by the bare effect of Poſſeſſion, without Preſcription.

Uſe of Poſſeſſion, and the differences between Property, Poſſeſſion, and Detention.

The uſe of Poſſeſſion is ſuch, that without it the Property would be uſeleſs. For it is only by the means of Poſſeſſion that we have the Things in our power, that we make uſe of them, and that we enjoy them; which is the reaſon why the word *Poſſeſſion* is often

uſed

uſed to ſignify Property [a], altho' they be two things which are neceſſarily to be diſtinguiſhed, they being ſo different that one may have one of them without the other [b]. Thus, for inſtance, if one ſells to another a Thing belonging to a third perſon, and delivers it to him, the Purchaſer who comes by it fairly and honeſtly, having the Thing in his cuſtody, and being conſidered as Maſter of it, he has the Poſſeſſion thereof, but not the Property, until he has acquired the ſame by a long Poſſeſſion: and this third perſon retains his Property without Poſſeſſion, until he brings his Action againſt the Purchaſer for the recovery of it.

[a] Interdùm proprietatem quoque verbum poſſeſſionis ſignificat; ſicut in eo qui poſſeſſiones ſuas legâſſet, reſponſum eſt. *l.* 78. *de verb. ſignif.*

[b] Nihil commune habet proprietas cum poſſeſſione. *l.* 12. §. 1. *ff. de acq. vel am. poſſ.*

It appears by this Example, that ſeeing Poſſeſſion and Property may be ſeparated, they are two different Things, which ought not to be confounded together. But altho' it may ſeem by this diſtinction, that Poſſeſſion is nothing elſe but a detention of that which one has in his cuſtody, whether he have the Property of it, or not; yet we muſt not take for a true Poſſeſſion all ſorts of Detention, but only that of a perſon who detains a Thing as being Maſter of it; whether it be that he himſelf has the actual detention of the Thing, it being in his own cuſtody, or that he exerciſes his Right by the Intervention of other perſons to whom he commits the cuſtody of it, ſuch as a Depoſitary, a Tenant, a Farmer; for in that caſe, he poſſeſſes the Thing by the hands of thoſe perſons who hold it in his name. So that whereas there is properly ſpeaking only one true Poſſeſſion, which is that of the Maſter; we may diſtinguiſh three ſorts of Detention, according to three different Cauſes which it may have. That of the Maſter, when he has in his own cuſtody the thing that belongs to him: that of the perſons who hold it for the Maſter: and that of Uſurpers, who detain it without any Right or Title.

Three Cauſes of Detention. The firſt of theſe Cauſes of the Detention of a Thing, is the Right of Property, which gives to the Proprietor the right to have in his cuſtody what is his own, that he may uſe it, enjoy it, and diſpoſe of it: and it is to this firſt Cauſe that the Detention is linked naturally.

The ſecond Cauſe of Detention is the will of the Owner of the Thing, which makes it to paſs into the hands of another perſon; as if it is a Houſe which he lets, Lands which he farms out, or gives to be enjoyed by a Creditor for a certain time, in ſatisfaction of his debt: If it is a Moveable which he lends, or lets out, which he depoſites, or gives in pawn. In all theſe caſes the Detention paſſes into other hands than the Maſter's, but without depriving him of his Poſſeſſion. For he retaining always his Right of Property, which implies the right to poſſeſs, and the Detention being in the hands of other perſons only in his name, it is he who poſſeſſes by the others, and they have only a borrowed Poſſeſſion for ſome time, and which can never acquire to them the Right of Property. And as he who appoints a Factor or Agent to ſell, to give, or tranſact, does himſelf ſell, give, and tranſact, according as the ſaid Factor or Agent does it in his name; ſo the Proprietor whoſe Poſſeſſion paſſes by his conſent into the hands of another perſon, poſſeſſes by the ſaid perſon [c].

[c] *See the eighth and ninth Articles of the firſt Section.*

The third Cauſe of Detention is Uſurpation, whether it be by Stealth, or by Robbery, or by ſome other unlawful way. And this manner of Detention does not deſerve the name of Poſſeſſion [d]. Thus it is by the Cauſe of the Detention that we are to judge, whether it is a Poſſeſſion, or only an Uſurpation. And when it is a Poſſeſſion, we muſt diſtinguiſh if it is in the hands of the Maſter to whom it naturally belongs, or if he poſſeſſes by the hands of another.

[d] Si vinxeris hominem liberum, cum te poſſidere non puto. *l.* 23. §. 2. *ff. de acq. vel amit. poſſ.*

We muſt diſtinguiſh in Poſſeſſion, that which is of Right, from that which is of Fact.

It follows from theſe Remarks, that it is neceſſary to diſtinguiſh in the general Idea which is formed from the word Poſſeſſion, a Right and a Fact; the Right to poſſeſs, and the actual Detention, which is a Fact. It is from thence that ariſe, and it is by that that we muſt explain the different ways of ſpeaking which we ſee in the Laws, That Poſſeſſion has nothing in common with Property: *Nihil commune habet proprietas cum poſſeſſione. l.* 12. §. 1. *ff. de acq. vel am. poſſ.* That the Poſſeſſion cannot be ſeparated from the Property: *Proprietas à poſſeſſione ſeparari non poteſt. l.* 8. *C. de acq. & ret. poſſ.* That Poſſeſſion is a thing of Fact, and not of Right: *Res facti,*

facti, non juris. l. 1. §. 3. *ff. de acq. vel am. poſſ.* That Poſſeſſion is not only a thing of Fact, but that it is likewiſe a matter of Right: *Poſſeſſio non tantùm corporis, ſed & juris eſt. l.* 49. §. 1. *eod.* That the Uſufructuary has a kind of natural Poſſeſſion: *Naturaliter videtur poſſidere is qui uſumfructum habet. l.* 12. *ff. de acq. vel am. poſſ.* That the Uſufructuary is not a Poſſeſſor: *Eum qui tantùm uſumfructum habet, poſſeſſorem non eſſe. l.* 15. §. 1. *ff. qui ſatiſd. cogantur.* That he does not poſſeſs: *Non poſſidet, ſed habet jus utendi, fruendi.* §. 4. *inſt. per quas perſ. nobis acq. l.* 1. §. 8. *ff. quod legat.* From all which it is neceſſary to conclude, that the true Poſſeſſion is properly ſpeaking only that of the Maſter: and that altho' others beſides the Maſter may have a right to detain the Thing, ſuch as the Tenant, the Farmer, the Uſufructuary, who having a right to enjoy, ought by conſequence to have the detention of the Thing; which in them is only a borrowed Poſſeſſion, or rather the Maſter's own Poſſeſſion, who poſſeſſes through them; becauſe the Right of Poſſeſſion cannot be ſeparated from the Property. This is not contrary to what has been ſaid, that he who purchaſes fairly and honeſtly Lands, or any other Thing, from one who was not the Owner of them, poſſeſſes them altho' he have not the Property: For this Purchaſer is conſidered as Proprietor, and therefore is looked upon as Poſſeſſor. And altho' the Maſter may be deprived of the actual detention by the detention of an Uſurper; yet he always preſerves his right to take Poſſeſſion, whenever he is able to remove the Uſurpation: And the unjuſt detention of the Uſurper, has only the appearance of a Poſſeſſion, altho' he have in effect hold of the Thing, and enjoys it; becauſe the vice of this Detention gives it another nature than that of the true Poſſeſſion, which ought to be founded on a juſt Title.

It is becauſe of this difference between the true Poſſeſſion of the Maſter, and all other Detention, that we diſtinguiſh two ſorts of Poſſeſſion, which are expreſſed by the words of *Civil Poſſeſſion*, and *Natural Poſſeſſion*[e], or otherwiſe by the words of *Legal Poſſeſſion*, and of *Corporeal*, or *Actual Poſſeſſion*[f]. The Civil or Legal Poſſeſſion is that of the Maſter; and the Natural or Corporeal Poſſeſſion, is that of the perſons who have only the bare detention of the Thing, ſuch as the Uſufructuary, the Farmer, and others. This Poſſeſſion is called Natural, or Corporeal, becauſe it conſiſts only in the bare natural detention, without the Right of Property: And the other is called Civil, or Legal, becauſe it is joined to the Right which the Law gives to poſſeſs as Maſter, whether he have likewiſe the natural detention of the Thing in his own hands, or whether he poſſeſſes it by the hands of another.

[e] Poſſeſſio non ſolùm civilis, ſed etiam naturalis intelligitur. *l.* 2. §. 1. *ff. pro hærede.*

[f] Nemo ambigit poſſeſſionis duplicem eſſe rationem, aliam quæ jure conſiſtit, aliam quæ corpore. *l.* 10. *C. de acq. & ret. poſſeſſ.*

Diverſe meanings of the word Poſſeſſion.

It is neceſſary to remark on all theſe different expreſſions of the Laws, ſome of which appear to be inconſiſtent with one another, that it ſeems as if diverſe meanings might be given to theſe words of Poſſeſſion, and of Civil and Natural Poſſeſſion, and as if we might underſtand theſe texts differently under different views, according to the ſaid different meanings, either giving to all manner of detention the name of Poſſeſſion, even to that of an Uſurper; or giving it only to that of the Maſter. But it is of no great importance, whether we qualify theſe ſeveral ſorts of Detention with the name of Poſſeſſion, or whether we diſtinguiſh them by peculiar words; provided that in confounding together the words Poſſeſſion and Detention, we do not confound the diverſe effects of theſe different manners of having a Thing in one's power: and that we diſtinguiſh the Cauſes of the Detention, and the differences between the Poſſeſſion of the Maſter, and that of an Uſurper, between theſe two Detentions and that of perſons who have a Thing in their hands, but do not claim the Property of it: and that we diſtinguiſh likewiſe among the perſons laſt mentioned, between thoſe who have ſome Right to the Thing, as an Uſufructuary, or a Farmer, and thoſe who have no Right to it, ſuch as a Depoſitary, and he who has found a Thing loſt, of which he knows the right Owner. For according to theſe differences we muſt diſtinguiſh the Rules which relate to all theſe perſons. Thus, for Example, whatever name we give to the Detention of an Uſufructuary, and whether we conſider him as poſſeſſing only in the name of the Maſter, or as having himſelf a kind of Poſſeſſion or Detention for his Uſufruct, we muſt know that he has nevertheleſs a Right to defend himſelf in his Enjoyment of

the Fruits, ſince he might maintain himſelf therein, even againſt the Proprietor himſelf, in caſe he ſhould offer to turn him out of Poſſeſſion[g]. And it would be the ſame thing with reſpect to a Farmer, and a Tenant[h]; for they have all of them a Right to enjoy, which cannot have its effect without an actual detention of the Thing which they have a Right to enjoy. So that we may ſay, that as they partake of the Right which the Maſter has to enjoy, they partake alſo of his Right to poſſeſs. And that they have a kind of Poſſeſſion proportioned to the uſe which their Right demands.

[g] *See the firſt Article of the firſt Section of Uſufruct.*
[h] *See the ſixth Article of the ſixth Section of Letting and Hiring.*

Connexion between Poſſeſſion and Property.

We may judge by all theſe Remarks of the Idea which we ought to conceive of the nature of Poſſeſſion, what connexion it has with the Right of Property; and that as we cannot exerciſe fully all the Rights of Property, if we are not in actual Poſſeſſion of the Thing, ſo likewiſe we have not a compleat Poſſeſſion of a Thing, unleſs we have the Property of it alſo.

It is becauſe of this connexion between Poſſeſſion and Property, and becauſe it is natural for the Proprietor to poſſeſs what belongs to him, that Poſſeſſion and Property are acquired and preſerved, the one by the other. Thus, whoever has acquired the full Property, whether it be by Sale, by Donation, by Legacy, or by other Titles, he has a Right to take Poſſeſſion. Thus he who poſſeſſes honeſtly and fairly, acquires the Property, if he had it not before, provided his Poſſeſſion laſts during the time that is regulated for Preſcription; and the Property is likewiſe acquired by the bare Poſſeſſion, without Preſcription, in certain caſes, as has been already remarked, and as will further appear in the ſecond Section.

SECT. I.

Of the Nature of Poſſeſſion.

The CONTENTS.

1. *Definition of Poſſeſſion.*
2. *Connexion between Poſſeſſion and Property.*
3. *There are not two Poſſeſſions of one and the ſame Thing.*
4. *What things may be poſſeſſed.*
5. *A kind of Poſſeſſion of Rights.*
6. *Poſſeſſion does not require a continual Detention.*
7. *Poſſeſſion of Living Creatures.*
8. *The bare Detention, without ſome Right in the Thing, is not a true Poſſeſſion.*
9. *One can poſſeſs by others.*
10. *Precarious Poſſeſſion.*
11. *Poſſeſſion is either honeſt or knaviſh.*
12. *A clandeſtine or ſurreptitious Poſſeſſion.*
13. *The Poſſeſſor is preſumed to be the right Owner.*
14. *Detention which the Owner cannot take away.*
15. *The Poſſeſſor is maintained in his Poſſeſſion without a Title, if no Title be produced againſt him.*
16. *If two perſons pretend to be Poſſeſſors, he who has been in poſſeſſion for the ſpace of a year is preferred.*
17. *The queſtion about the Poſſeſſion is judged before that of the Property.*
18. *The Demand of the Poſſeſſion ought to be made within the year.*
19. *If the Poſſeſſion be doubtful, Judgment is given according to the Titles, or the Thing is ſequeſtred.*

I.

1. Definition of Poſſeſſion.

POſſeſſion, taken in a proper ſenſe, is the detention of a Thing, which he who is Maſter of it, or who has reaſon to believe that he is ſo, has in his own keeping, or in that of another perſon by whom he poſſeſſes[a].

[a] Poſſeſſio appellata eſt (ut & Labeo ait) à ſedibus, quaſi poſitio: quia naturaliter tenetur ab eo qui ei inſiſtit, quam Græci κατοχὴν dicunt. *l.* 1. *ff. de acq. vel am. poſſ.*

This definition reſults from what has been ſaid in the Preamble, and from the ſecond, ſixth, eighth, ninth and eleventh Articles of this Section. See the twelfth Article of the ſecond Section.

II.

2. Connexion between Poſſeſſion and Property.

Seeing the uſe of Property is to have a Thing in order to enjoy it, and to diſpoſe of it, and that it is only by Poſſeſſion that one can exerciſe this Right; Poſſeſſion therefore is naturally linked to the Property, and ought not to be ſeparated from it. Thus, Poſſeſſion implies a Right and a Fact; the Right to enjoy annexed to the Right of Property, and the Fact of the real detention of the Thing, that it be in the hands of the Maſter, or of another for him[b].

[b] Proprietas à poſſeſſione ſeparari non poteſt. *l.* 8. *C. de acquir. & retin. poſſeſſ.* Res facti non juris (poſſeſſio.) *l.* 1. §. 3. *ff. de acq. vel amitt. poſſ.*

Plurimum

Plurimum ex jure poſſeſſio mutuatur. *l.* 49. *cod.*. Poſſeſſio non tantùm corporis, ſed & juris eſt. *d. l.* 49. §. 1.

See the thirteenth Article of this Section, the firſt Article of the third Section, and the third and fourth Articles of the ſecond Section.

III.

3. *There are not two Poſſeſſions of one and the ſame Thing.*

As it is not poſſible when two perſons contend for the property of one and the ſame Thing, that each of them alone can have the Right of Property; ſo neither is it poſſible, when two perſons diſpute about the Poſſeſſion of one and the ſame Thing, for every one of them alone to have the Poſſeſſion. But as there is only one who is the true Owner, ſo likewiſe there is only one true Poſſeſſor[c]. And if it happens that the Poſſeſſor is another perſon than the right Owner, his Poſſeſſion will be only an Uſurpation, and he will be obliged to relinquiſh it, and to deliver it up to the Owner.

[c] Plures eamdem rem in ſolidum poſſidere non poſſunt. Contra naturam quippe eſt, ut cùm ego aliquid teneam, tu quoque id tenere videaris. *l.* 3. §. 5. *ff. de acq. vel amitt. poſſeſſ.* Ait (Celſus) duorum in ſolidum dominium, vel poſſeſſionem eſſe non poſſe. *l.* 5. §. *ult. ff. commod.* Duo in ſolidum precariò habere non magis poſſunt, quàm duo in ſolidum vi poſſidere, aut clam. Nam neque juſtæ neque injuſtæ poſſeſſiones duæ concurrere poſſunt. *l.* 19. *ff. de precar. V. l.* 5. *ff. uti poſſidetis.* See the ninth and tenth Articles of this Section.

IV.

4. *What Things may be poſſeſſed.*

One may poſſeſs Corporeal Things, whether they be Moveables, or Immoveables[d]; but according to the differences of their Nature, the marks of the Poſſeſſion of them are different. Thus, one may poſſeſs Moveables, by keeping them under Lock and Key, or having them otherwiſe at one's diſpoſal: Thus, one poſſeſſes Cattle, either by ſhutting them up, or giving them to be kept: Thus, one poſſeſſes a Houſe by dwelling in it, or having the Keys thereof, or truſting it to a Tenant; or by building in it. Thus, one poſſeſſes Lands by cultivating them, reaping the Fruits, going and coming through them, and diſpoſing thereof at pleaſure[e].

[d] Poſſideri poſſunt quæ ſunt corporalia. *l.* 3. *ff. de acq. vel amitt. poſſeſſ.*

[e] Mercium in horreis conditarum poſſeſſio tradita videtur, ſi claves apud horrea traditæ ſint: quo facto confeſtim emptor dominium & poſſeſſionem adipiſcitur. *l.* 74. *ff. de contr. empt.*

Nerva filius res mobiles, quatenus ſub cuſtodia noſtra ſint hactenus poſſideri: id eſt, quatenus, ſi velimus, naturalem poſſeſſionem nanciſci poſſimus. Nam pecus ſimul atque aberraverit, &c. *l.* 3. §. 13. *ff. de acq. vel amitt. poſſeſſ.* See the ſixth Article of this Section touching the Poſſeſſion of Immoveables. See the ſeventeenth Article of the ſecond Section.

V.

5. *A kind of Poſſeſſion of Rights.*

There is likewiſe a kind of Poſſeſſion of Things which conſiſt only in Rights, ſuch as a Right of Juriſdiction, a Right which a Lord of a Mannor may have to oblige his Vaſſals and Tenants to grind in his Mills, and bake in his Ovens, and to pay him a Fee for the uſe of them, a Toll, an Office, and other ſorts of Goods which one poſſeſſes by the uſe and exerciſe which he makes of his Right as occaſion offers. And it is this exerciſe which makes the Poſſeſſion of ſuch Things, as well as of a Service, which is likewiſe a Right of another nature, which one poſſeſſes by the uſe he makes of it, although he does not poſſeſs the Lands or Houſes from which the Service is due. Thus, he who has a Right of Paſſage through the Ground of his Neighbour, poſſeſſes that Service by going through the ſaid Ground which he does not poſſeſs[f].

[f] Ego puto uſum ejus juris pro traditione poſſeſſionis accipiendum eſſe. *l. ult. ff. de ſervitut.*

VI.

6. *Poſſeſſion does not require a continual detention.*

Although Poſſeſſion implies the detention of what we poſſeſs, yet this detention ought not to be ſo underſtood, as if it were neceſſary to have always either in our hand, or in our ſight, the Things of which we have the Poſſeſſion. But after the Poſſeſſion has been once acquired, it is preſerved without an actual detention[g], as ſhall be explained in the ſecond Section.

[g] Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poteſt. *l.* 4. *C. de acquir. & ret. poſſeſſ.*

VII.

7. *Poſſeſſion of Living Creatures.*

As we may poſſeſs Living Creatures, which it is not poſſible to have always in our power and cuſtody, ſo we retain the Poſſeſſion of them whilſt we ſhut them up, whilſt we have them under the care of a Keeper, or that being made tame, they return home without a Keeper, as Bees to their Hives, and Pigeons to their Dove-houſes. But the Creatures which eſcape out of our cuſtody, and do not come back, are no longer in our poſſeſſion, till we recover them again[h].

[h] Quidquid eorum (ferarum & volucrum) ceperimus, eò uſque noſtrum eſſe intelligitur, donec noſtra cuſtodia coercetur. *l.* 3. §. 2. *ff. de acq. rer. dom.*

Aves poſſidemus quas incluſas habemus: aut ſi quæ manſuetæ factæ, cuſtodiæ noſtræ ſubjectæ ſunt. *l.* 3. §. 15. *ff. de acq. vel amitt. poſſ.*

Quidam

Quidam rectè putant, columbas quoque, quæ ab ædificiis noſtris volant, item apes quæ ex alveis noſtris evolant, & ſecundùm conſuetudinem redeunt, à nobis poſſideri. *d. l.* 3. §. 16.

Nerva filius, res mobiles quatenus ſub cuſtodia noſtra ſint hactenùs poſſideri, id eſt, quatenùs ſi velimus naturalem poſſeſſionem nanciſci poſſimus. Nam pecus ſimul atque aberraverit ut non inveniatur, protinùs deſinere à nobis poſſideri, licet à nullo poſſideatur. *d. l.* 3. §. 13.

VIII.

8. The bare Detention, without ſome Right in the Thing, is not a true Poſſeſſion.

The bare detention of a Thing, is not properly called Poſſeſſion: and it is not enough for Poſſeſſion, that we have actual hold of a Thing, and have it in our cuſtody; but we muſt have it, together with the right to enjoy it, and to diſpoſe of it, as being Maſters of it, or as having juſt cauſe to believe our ſelves to be the right Owners[i]. For he who detains a Thing without having this Right, if he detains it againſt the will of the Owner, is not a Poſſeſſor, but an Uſurper: Or if it is with the Owner's good will, this detention leaves to the Owner his Poſſeſſion, and it is he who poſſeſſes[l].

[i] Opinione domini. *l.* 22. §. 1. *ff. de noxal. act.* Cogitatione domini. *l.* 21. *C. de furt.*

Poſſeſſio non tantum corporis, ſed & juris eſt. *l.* 49. §. 1. *ff. de acq. vel amitt. poſſeſſ.* See the ſecond Article.

[l] Rei depoſitæ proprietas apud deponentem manet: ſed & poſſeſſio. *l.* 17. §. 1. *ff. de poſ.* See the following Article, and the eleventh Article of the fifth Section.

IX.

9. One may poſſeſs by others.

One may poſſeſs a Thing, not only by one's ſelf, but alſo by other perſons. Thus, the Proprietor of a Houſe, or other Tenement, poſſeſſes by his Tenant, or by his Farmer. Thus, the Debtor who has given a Pawn to his Creditor, he who has depoſited or lent a Thing, or given it to be enjoyed by another, poſſeſs by thoſe to whom they have given the Thing in keeping. Thus, the Minor poſſeſſes by his Guardian. Thus, one poſſeſſes by a Factor, or Agent; and in general, every Proprietor poſſeſſes by the perſons who hold the Thing in his name[m].

[m] Is cujus colonus, aut hoſpes, aut quis alius iter ad fundum fecit, uſus videtur itinere, vel actu, vel via: & ideircò interdictum habebit. *l.* 1. §. 7. *ff. de itin. act. pr.*

Qui ex conducto poſſidet, quamvis corporaliter teneat, non tamen ſibi, ſed domino rei creditur poſſidere. *l.* 1. *C. comm. de uſuc.*

Per procuratorem, tutorem, curatorémve, poſſeſſio nobis acquiritur. *l.* 1. §. 20. *ff. de acq. vel amitt. poſſeſſ.*

Generaliter quiſquis omninò noſtro nomine ſit in poſſeſſione, veluti procurator, hoſpes, amicus, nos poſſidere videmur. *l.* 9. *eod.*

See the Preamble to this Title.

X.

10. Precarious Poſſeſſion.

Thoſe who poſſeſs precariouſly, that is, by having prayed the Maſter to let them have the Poſſeſſion, do not deprive him thereof; but poſſeſſing by his conſent, they poſſeſs for him. Thus, for inſtance, if the Seller of a Houſe, or of Lands, does not deliver the ſame at the time of the Contract, and that he keeps poſſeſſion thereof, whether it be to reap the Fruits which he had reſerved to himſelf for a certain time, or that he might have time to evacuate the places, and to deliver them free from all incumbrances, or for other cauſes; it is mentioned in the Contract, that he ſhall poſſeſs only precariouſly. Which hath this effect, that the Purchaſer is conſidered as poſſeſſing by the hands of the Seller. And if we conſider both the one and the other as having the Poſſeſſion; that of the Purchaſer who is Maſter, is diſtinguiſhed by his Right, and by his intention of poſſeſſing as Maſter: and that of the Seller conſiſts only in a bare Detention, without the Right of Property, and is not a true Poſſeſſion[n].

[n] Is qui rogavit, ut precariò in fundo moretur, non poſſidet: ſed poſſeſſio apud eum qui conceſſit, remanet. *l.* 6. §. 2. *ff. de precar.*

Eum qui precariò rogavit, ut ſibi poſſidere liceat, nanciſci poſſeſſionem non eſt dubium. An is quoque poſſideat, qui rogatus ſit, dubitatum eſt. Placet autem, penes utrumque eſſe eum hominem, qui precariò datus eſſet: penes eum qui rogâſſet, quia poſſederat corpore: penes dominum, quia non diſceſſerit animò poſſeſſione. *l.* 15. §. 4. *eod.*

We have added the laſt words of this Article, in order to reconcile the apparent contrariety that is between theſe two texts.

XI.

11. Poſſeſſion is either honeſt or knaviſh.

There are two ſorts of Poſſeſſors, thoſe who poſſeſs honeſtly and fairly, and thoſe who poſſeſs knaviſhly[o]. The honeſt and fair Poſſeſſor is he who is truly Maſter of the Thing which he poſſeſſes, or who has juſt cauſe to believe that he is ſo, altho' it may happen in effect that he is not; as it happens to him who buys a Thing which he thinks belongs to the perſon whom he buys it of, and yet belongs to another. The knaviſh Poſſeſſor is he who poſſeſſes as Maſter, but who aſſumes this quality when he knows very well either that he has no Title at all to it, or that his Title thereto is vicious and defective. We ſhall ſee the effects of theſe two ſorts of Poſſeſſion in the third Section.

[o] Poteſt dividi poſſeſſionis genus in duas ſpecies, ut poſſideatur aut bonâ fide, aut non bonâ fide. *l.* 3. §. 22. *ff. de acq. vel amitt. poſſeſſ.*

XII. We

XII.

12. *A clandeſtine or ſurreptitious Poſſeſſion.*

We muſt reckon in the number of knaviſh Poſſeſſors, not only Uſurpers, but alſo thoſe who foreſeeing that the Right which they pretend to have will be diſputed, and fearing leſt they ſhould be hindred from taking poſſeſſion thereof, take ſome opportunity of getting into Poſſeſſion ſurreptitiouſly, without the knowledge of the perſon from whom they expect the oppoſition [p].

[p] Clam poſſidere eum dicimus qui furtivè ingreſſus eſt poſſeſſionem ignorante eo quem ſibi controverſiam facturum ſuſpicabatur, & ne faceret timebat. *l.* 6. *ff. de acq. vel amitt. poſſ.*

Clam committentes, ut contumaces plectuntur. *l. ult. in f. ff. de ritu nupt. V. l.* 10. *ſi ſerv. vind.*

XIII.

13. *The Poſſeſſor is preſumed to be the right Owner.*

Altho' the Poſſeſſion be naturally linked with the Property, and that it ought not to be ſeparated from it [q]; yet we muſt not confound them, ſo as to believe that the one cannot be without the other [r]. For it often happens that the Property of a Thing being controverted between two perſons, there is only one of the two who is owned to be Poſſeſſor, and it may be that it is the perſon who is not the right Owner, and that thus the Poſſeſſion may be ſeparated from the Property. But even in this caſe, the natural connexion which is between the Poſſeſſion and the Property, makes the Law to preſume that they are joined in the perſon of the Poſſeſſor: and until it be proved that the Poſſeſſor is not the right Owner, the Law will have him, by the bare effect of his Poſſeſſion, to be conſidered as ſuch. For ſeeing it is the Owner who ought to poſſeſs, it is natural to preſume that he who is in poſſeſſion is alſo the right Owner, and that the right Owner has not ſuffered himſelf to be turned out of poſſeſſion [s].

[q] *See the ſecond Article.*

[r] Poſſeſſio & proprietas miſceri non debent. *l.* 52. *ff. de acq. vel amitt. poſſ.*

Nihil commune habet proprietas cum poſſeſſione. *l.* 12. §. 1. *eod.*

Fieri enim poteſt ut alter poſſeſſor ſit, dominus non ſit: alter dominus quidem ſit, poſſeſſor verò non ſit: fieri poteſt, ut & poſſeſſor idem & dominus ſit. *l.* 1. §. 2. *ff. uti poſſid.*

[s] *See the firſt Article of the fourth Section of the Title of Proofs.*

XIV.

14. *Detention which the Owner cannot take away.*

The Poſſeſſion, or the Right which the Maſter has to poſſeſs, is often ſeparated from the actual detention, and the Maſter may have no right to take away the Thing from him who has it in his keeping. Thus, for inſtance, if he who ſells an Eſtate reſerves to himſelf the enjoyment of it for ſome years, he will keep the Poſſeſſion, and cannot be turned out of it, altho' he is not any longer Maſter of it. Thus he who has the Uſe and Profits of an Eſtate, holds and poſſeſſes it, and the Proprietor cannot moleſt him in his Poſſeſſion. Thus the Debtor cannot take away from his Creditor that which he has given him in pawn. But in theſe caſes, the Detention not being a conſequence of the Right of having a Thing to one's ſelf, and of diſpoſing of it; it is not a true Poſſeſſion, in the ſenſe of the definition explained in the firſt Article, which may entitle one to exerciſe all the Rights of Poſſeſſion when it is joined with the Property; but it is only a Right to hold the Thing for the uſe thereof which may have been granted to thoſe perſons who have the actual Detention of it [t].

[t] Qui uſusfructus nomine rem tenet non utique poſſidet. *l.* 5. §. 1. *ff. ad exhib. l.* 1. §. 8. *ff. de acq. vel amit. poſſ.* Fructuarius non poſſidet. §. 4. *inſt. per quas perſ. cuiq. acq.* See the twenty third Article of the third Section of Pawns and Mortgages.

Utrùm autem adverſus dominum dumtaxat in rem actio uſufructuario competat, an etiam adverſus quemvis poſſeſſorem, quæritur? Et Julianus, libro ſeptimo Digeſtorum, ſcribit, hanc actionem adverſus quemvis poſſeſſorem ei competere. *l.* 5. §. 1. *ff. ſi uſuf. pet.* See the firſt Article of the fifth Section of Uſufruct.

XV.

15. *The Poſſeſſor is maintained in his Poſſeſſion without a Title, if no Title be produced againſt him.*

It follows from the Rule explained in the thirteenth Article, that all Poſſeſſors ought to be maintained in their Poſſeſſion and Enjoyment of the Thing, until they who trouble them in their Poſſeſſion prove clearly their Right. And if a demand of the Property againſt a Poſſeſſor is not grounded upon good and ſufficient Titles, it is enough for the Poſſeſſor to alledge his Poſſeſſion, without producing any other defences [u].

[u] In pari cauſa poſſeſſor potior haberi debet. *l.* 126. *ff. de reg. jur.* See the firſt Article of the fourth Section of the Title of Proofs.

This Rule which maintains the Poſſeſſor in his Poſſeſſion, even without a Title, againſt him who diſturbs him, ought not to be extended to matters relating to Church-Benefices, in which Law-Suits are ſo very frequent, about the Poſſeſſion of the Benefices. For there is this difference between the Poſſeſſion of Church-Benefices, and that of Temporal Goods, which enter into Commerce; that whereas in theſe all Poſſeſſors are maintained in their Poſſeſſion without any Title, if they who diſturb them therein produce no Title on their part; the Poſſeſſor of a Church Benefice is not maintained therein, if, together with his Poſſeſſion, he have not a capacity for the Function, and a good Title to the Benefice. Which difference is founded upon this, that whereas all ſorts of perſons are capable of poſſeſſing the Things which are in Commerce, and that the ways of acquiring them

are indefinite; Eccleſiaſtical Benefices cannot be poſſeſſed but by perſons who have a capacity proportioned to the quality of the Function, and who are inducted therein by the ways which the Laws of the Church have eſtabliſhed for that purpoſe. So that the Right of Poſſeſſion in Church Benefices is judged not by the bare Poſſeſſion, but according to the cleareſt Titles. De Præbend. c. eum qui lib. 6. De Reg. Jur. c. 1. lib. 6. See the Ordinances of 1453. art. 75. 1493. art. 58. 1535. chap. 9. art. 6. 1667. tit. 15. art. 2. & 6.

XVI.

16. *If two perſons pretend to be Poſſeſſors, he who has been in poſſeſſion for the ſpace of a year, is preferred.*

Seeing the Poſſeſſion is in ſome caſes ſufficient of it ſelf to maintain the Poſſeſſor therein, it often happens that the two Parties who claim the Property of one and the ſame Eſtate, pretend likewiſe that they are in poſſeſſion of it, and that each of them on his part, in order to be maintained in the Poſſeſſion, endeavours to make it appear that he is Poſſeſſor; and that they reciprocally moleſt one another by Acts which may ſhew them to be in Poſſeſſion. And in theſe caſes, if it appears that one of the two has been in peaceable Poſſeſſion for the ſpace of a year, before the diſturbance given him by the other, he will be maintained therein [x].

[x] Hoc interdicto prætor non inquirit, utrùm habuit jure ſervitutem impoſitam, an non: ſed hoc tantùm an itinere, actuque hoc anno uſus ſit, non vi, non clam, non precariò: & tuetur eum. *l.* 1. §. 2. *ff. de itin. actuq. priv.*

Annum ex die interdicti retrorſum computare debemus. *d. l.* §. 3.

Vi pulſos reſtituendos eſſe, interdicti exemplo, ſi necdum utilis annus exceſſit, certiſſimi juris eſt. *l.* 2. *C. unde vi.*

XVII.

17. *The queſtion about the Poſſeſſion is judged before that of the Property.*

The Controverſies whereof the matter in diſpute is to regulate between two perſons, who pretend to be Poſſeſſors of one and the ſame Thing, which of the two ſhall be maintained in the Poſſeſſion, ought to be inſtructed and decided without examining into the Right of Property. For the diſcuſſion of the Titles neceſſary for deciding the Right of Property, demands often delays which the diſpute about the Poſſeſſion cannot admit of. And ſeeing it is of importance not to leave two Poſſeſſors expoſed to the danger of the conſequences of ſuch a diſpute; the matter touching the Poſſeſſion is regulated in the firſt place, and it is only after that the ſame is fully ended, that Enquiry is made into the Right of Property [y]. Thus he who is declared to be Poſſeſſor, has the advantage of retaining the Poſſeſſion, whilſt the Property remains undetermined [z].

[y] Exitus controverſiæ poſſeſſionis hic eſt tantùm ut priùs pronuntiat judex uter poſſideat. Ita enim fiet, ut is qui victus eſt de poſſeſſione, petitoris partibus fungatur: & tunc de domino quæratur. *l.* 35. *ff. de acq. vel amitt. poſſ.*

Incerti juris non eſt, orta proprietatis & poſſeſſionis lite, priùs poſſeſſionis decidi oportere quæſtionem competentibus actionibus: ut ex hoc ordine facto, de dominii diſceptatione probationes ab eo qui de poſſeſſione victus eſt exigantur. *l.* 3. *C. de interdictis. l.* 35. *ff. de acq. vel amitt. poſſ.*

By the Ordinances of France, *one cannot commence his Action for the Property, till the Queſtion about the Poſſeſſion has been decided, and that he who ſhall have been condemned, has fully ſatisfied the Sentence, by reſtoring the Fruits and paying the Coſts, and Damages, if any have been awarded; and the Parties are not ſuffered to join theſe two Demands of the Poſſeſſion and Property together, in one and the ſame Action.* See the Ordinance of 1667. Tit. 18. Art. 4. and 5. See the following Article.

[z] Is qui deſtinavit rem petere animadvertere debet, an aliquo interdicto poſſit nanciſci poſſeſſionem: quia longè commodiùs eſt ipſum poſſidere, & adverſarium ad onera petitoris compellere quàm alio poſſidente, petere. *l.* 24. *ff. de rei vindic.*

XVIII.

18. *The Demand of the Poſſeſſion ought to be made within the year.*

He who pretends to have been interrupted in his Poſſeſſion, ought to make his Demand or Complaint thereof within the year, to be reckoned from the day of his being turned out of Poſſeſſion [a]. For if he leaves his Adverſary in Poſſeſſion for the ſpace of a year, he has loſt his own Poſſeſſion, whatever apparent Right he may have had to it. But he retains his Action for the Property [a].

[a] Vi pulſos reſtituendos eſſe, interdicti exemplo, ſi necdùm utilis annus exceſſit, certiſſimi juris eſt. *l.* 3. *C. unde vi, l.* 1. *in f. ff. de interdict.*

By the Ordinances of France, *the Action for the Poſſeſſion ought to be begun within the year after the diſturbance.* See the Ordinance of 1539. Art. 61. and that of 1667. Title 18. Art. 4. & 5.

XIX.

19. *If the Poſſeſſion be doubtful, Judgment is given according to the Titles, or the Thing is ſequeſtred*

If the queſtion touching the Poſſeſſion be doubtful, ſo that there does not appear ground enough to maintain any one of the Poſſeſſors therein, the Poſſeſſion will be adjudged in favour of the perſon who ſhall have the moſt probable Title; or the Judge will order the Thing in controverſy to be ſequeſtred, until the Queſtion relating to the Property, or that of the Poſſeſſion, ſhall be decided [b].

[b] *This is a conſequence of the preceding Rules.* See the Ordinances of 1453. Art. 74. of 1555. chap. 9. Art. 3. of 1498. Art. 86. of 1667. Tit. 15. Art. 10. Tit. 19.

See the fourth Section of the Title of a Depoſitum. *l.* 9. §. 3. *ff. de dolo. l.* 39. *ff. de acq. vel amit. poſſ. l.* 21. §. 3. *ff. de appell. l.* 5. *Cod. quor. appel.*

SECT. II.

Of the connexion between Poſſeſſion and Property: and how one may acquire or loſe the Poſſeſſion.

The CONTENTS.

1. *The Right to poſſeſs is acquired with the Property.*
2. *Difference between acquiring the Right to poſſeſs, and acquiring the actual Poſſeſſion.*
3. *In ſome caſes the Property may be acquired by the bare effect of Poſſeſſion.*
4. *In theſe caſes the Poſſeſſion is a Title for the Property.*
5. *One acquires by Poſſeſſion, what no other body has a right to.*
6. *As if one finds precious ſtones, and other things of value.*
7. *Property is acquired by Hunting, and Fiſhing.*
8. *By Captures from the Enemy.*
9. *If one finds a Thing that is relinquiſhed, or thrown away with intention to give it to whoſoever can catch it.*
10. *Or a Thing that was loſt, the Owner whereof cannot be found.*
11. *Or a Treaſure.*
12. *What Nature adds to a Ground, belongs to the Maſter of the Ground.*
13. *The Poſſeſſion of the Building is acquired to the Maſter of the Ground.*
14. *It is the ſame thing in reſpect of what is planted.*
15. *Poſſeſſion of what is added to a Moveable.*
16. *In what Poſſeſſion conſiſts.*
17. *Poſſeſſion which one takes of his own accord, without a preceding Right.*
18. *Poſſeſſion which is only taken by delivery of the Thing.*
19. *In what conſiſts the Delivery which gives Poſſeſſion.*
20. *Delivery and taking of Poſſeſſion.*
21. *Delivery and taking Poſſeſſion of Immoveables.*
22. *Delivery and taking poſſeſſion of Things which conſiſt in Rights.*
23. *One can poſſeſs only a Thing which is certain and determined.*
24. *How the Poſſeſſion is preſerved.*
25. *One retains the Poſſeſſion by other perſons.*
26. *One may take Poſſeſſion either himſelf, or by other perſons.*
27. *The Poſſeſſor ſucceeds to the Right of his Author.*
28. *One loſes the Poſſeſſion of what one alienates, or relinquiſhes.*
29. *Things that are loſt, and thoſe which are thrown into the Sea in a danger of Shipwrack, are not relinquiſhed.*
30. *One loſes his Poſſeſſion, by the Poſſeſſion of another.*

I.

SEeing Poſſeſſion is naturally linked with the Right of Property, and ought not to be ſeparated from it[a], whoever has acquired the Property of a Thing, either acquires at the ſame time the Poſſeſſion thereof, or has a Right to get it, and to recover it if he had loſt it[b]. Thus there are as many different Cauſes of Poſſeſſion, as there are different Titles of Property[c]. 1. *The Right to poſſeſs is acquired with the Property.*

[a] *See the ſecond Article of the firſt Section.*

[b] Rem in bonis noſtris habere intelligimur quoties poſſidentes exceptionem, aut amittentes, ad recipiendam eam, actionem habemus. *l.* 52. *ff. de acq. rer. dom.*

[c] Genera poſſeſſionum tot ſunt quot & cauſæ acquirendi ejus quod noſtrum fit. Velut pro emptore, pro donato, pro legato, pro dote, pro noxæ dedito, pro ſuo, ſicut in his quæ terra, marique, vel ex hoſtibus capimus: vel quæ ipſi, ut in rerum natura eſſent, fecimus: & in ſumma magis unum genus eſt poſſidendi, ſpecies infinitæ. *l.* 3. §. 21. *ff. de acq. vel. amitt. poſſeſſ.*

II.

We muſt not confound the ways of acquiring the Right to poſſeſs, of which mention has been made in the foregoing Article, with the ways of entring and getting into Poſſeſſion, and of having a thing in one's power to uſe it, to enjoy it, and to diſpoſe of it. The ways of acquiring the Property of Things, and by means of the Property the Right to poſſeſs them, are infinite. For one acquires them by a Sale, by Exchange, by Donation, and by other different Titles which the Laws have regulated. But there is only the effectual Detention which puts us into the real and actual Poſſeſſion of what is ours. And this detention is acquired in the manner that ſhall be explained in the ſixteenth Article, and the other Articles which follow[d]. 2. *Difference between acquiring the Right to poſſeſs, and acquiring the actual Poſſeſſion.*

[d] Quarumdam rerum dominium nanciſcimur jure gentium quod ratione naturali inter omnes homines peræquè cuſtoditur: quarumdam jure civili; id eſt, jure proprio civitatis noſtræ. *l.* 1. *ff. de acq. rer. dom.* §. 11. *inſt. de rer. diviſ.*

As to the diſtinction between the Law of Nations, and the Civil Law, of which mention is made in this text, ſee what has been ſaid thereof in the Treatiſe of Laws,

Laws, Chap. 11. *numb.* 1. 4. 32. 33. 39. *and following numbers.*

III.

3. In ſome caſes the Property may be acquired by the bare effect of Poſſeſſion.

The connexion between the Poſſeſſion and the Property, has not only this firſt effect, that the Property implies and gives the Right to poſſeſs; but it has alſo this ſecond effect, that the Poſſeſſion gives often the Property. Thus, whoever acquires the Poſſeſſion of a Thing of which he may likewiſe have the Property, and which belongs to no body, he himſelf becomes Maſter of it by the bare effect of the Poſſeſſion. For by having in his power that which no body has a right to take from him, he becomes at one and the ſame time both Poſſeſſor and Proprietor thereof[e]. And this happens in ſeveral caſes, which ſhall be explained in the fifth and other following Articles.

[e] Quod nullius eſt, id naturali ratione occupanti conceditur. §. 12. *inſt. de rer. diviſ. l.* 3. *ff. de acq. rer. dom.*

IV.

4. In theſe caſes the Poſſeſſion is a Title for the Property.

All the manners of acquiring the Property by the Poſſeſſion, are ſo many ways which make a part of thoſe which Nature and the Laws give to Mankind, for applying to their uſe the ſeveral Things whereof the Poſſeſſion is neceſſary in order to have the uſe of them. For there are Things which one uſes without poſſeſſing them, and which indeed cannot be poſſeſſed, whether it be becauſe of their nature, or becauſe the Uſe of them is as yet common to all perſons: and there are others of which we cannot have the uſe without poſſeſſing them. Thus, we have the uſe of the Air, the Light, the Sea, Rivers, Highways, and many other things without poſſeſſing them; and we cannot uſe without poſſeſſion that which is neceſſary for Food and Raiment, and for an infinite number of other different uſes. And it is this Poſſeſſion which is acquired, either by the Titles which convey the Property, or without any other Title beſides the Events which put the Things into our hands, and which make them ours, as if it were by a deliverance of them to us by the Divine Providence, which orders and directs thoſe Events[f].

[f] Naturali jure communia ſunt omnium hæc, aër, aqua profluens, mare. §. 1. *inſt. de rer. diviſ. l.* 2. §. 1. *eod.* See the firſt, ſecond, and third Articles of the firſt Section of the Title of Things.

V.

5. One acquires by Poſſeſſion what no other body has a right to.

It is natural, according to the Principles which have been remarked in the preceding Articles, that the Things which God has created for the uſe of particular perſons, and which have not as yet paſſed into the Poſſeſſion of any body, ſhould belong to thoſe who are the firſt who diſcover, and make uſe of them. Thus, when Mankind began to increaſe and multiply, thoſe who entred firſt into the Lands which were not inhabited, and took poſſeſſion of them, became juſtly Maſters of them[g].

[g] Quod nullius eſt id ratione naturali occupanti conceditur. *l.* 3. *ff. de acq. rer. dom.*

VI.

6. As if one finds precious ſtones, and other things of value.

Thoſe who diſcover, or who find without deſign precious ſtones, and other things of great value, in places where it is lawful for them to ſearch for them, and to take them, become Maſters of them[h].

[h] Lapilli, & gemmæ, & cætera quæ in littore maris inveniuntur, jure naturali ſtatim inventoris fiunt. §. 18. *inſt. de rer. divis. l.* 3. *ff. eod.*

We have not put down this Article in the general terms of an indefinite liberty to all perſons to acquire the Property of thoſe kinds of Things, by diſcovering, or finding them. For according to our Uſage, the precious matters which are the produce of Mines, for Example, do not belong entirely to thoſe who diſcover them, even in their own Lands; but the King has a Right to a ſhare of them; which is regulated by the Ordinances. See the fifth Article of the ſecond Section of the Title of Things.

VII.

7. Property is acquired by Hunting, and Fiſhing.

Wild Beaſts, Fowls, Fiſhes, and every thing that is taken either in Hunting, Fowling, or Fiſhing, by thoſe who have a right thereto, belongs to them as their Property, by virtue of the ſeizure which they make of them[i].

[i] Feræ beſtiæ, & volucres, & piſces, & omnia animalia quæ mari, cœlo & terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt. §. 12. *inſt. de rer. diviſ. l.* 1. §. 1. *ff. de acq. rer. dom.*

It is to be remarked on this Article, that the liberty of Hunting, Fowling, and Fiſhing, is not permitted to all perſons, in all places indifferently. See the eleventh Article of the firſt Section of the Title of Things, and the remark on the firſt Article of the ſame Title.

VIII.

8. By Captures from the Enemy.

We acquire likewiſe by Capture and by the Right of War, that which we take from the Enemy[l].

[l] Ea quæ ex hoſtibus capimus jure gentium ſtatim noſtra fiunt. §. 17. *inſt. de rer. diviſ.*

It is alſo to be obſerved on this Article, that the Spoil and Booty taken from the Enemy, does not always belong indifferently and intirely to thoſe who make the Capture. For the Admiral, for inſtance, has a Right to a ſhare of the Prizes that are taken at Sea.

IX.

9. *If one finds a thing that is relinquished, or thrown away with intention to give it to whoſoever can catch it.*

He who finds a Thing that is abandoned, that is, of which he who was Maſter of it quits and relinquiſhes the Poſſeſſion and Property, not being willing to keep it any longer, becomes Maſter of it[m]; in the ſame manner as if it had never belonged to any body. And it is with much greater reaſon, that thoſe who gather up pieces of Money, or other Things, which Princes, or other perſons, throw among the multitude, out of magnificence, on ſome extraordinary occaſions, acquire what falls into their hands. For beſides the Poſſeſſion of a Thing, which he who was Maſter of it is not willing to keep any longer, they have his intention, which makes over the Things to thoſe who catch them[n].

[m] Si res pro derelicto habita ſit ſtatim noſtra eſſe deſinit, & occupantis ſtatim fit. Quia iiſdem modis res deſinunt eſſe noſtræ quibus modis acquiruntur. *l.* 1. *ff. pro derelicto.* §. 47. *inſt. de rer. diviſ.* See the third, twenty eighth, and twenty ninth Articles.

[n] Hoc ampliùs interdùm & in incertas perſonas collata voluntas domini transfert rei proprietatem. Ut ecce, qui miſſilia jactat in vulgus; ignorat enim quid eorum quiſque excepturus ſit. Et tamen quia vult, quod quiſque exceperit, ejus eſſe, ſtatim eum dominum efficit. *l.* 9. §. 7. *ff. de acq. rer. dom.* §. 46. *inſt de rer. diviſ. Nov.* 105. *c.* 2. §. 1.

X.

10. *Or a Thing that was loſt, the Owner whereof cannot be found.*

If he who has found a Thing that was loſt, having done all that was poſſible to find out the true Owner, that he might reſtore it to him, cannot learn who he is, he remains Maſter of it, till he who was the Owner appears and proves his Right[o].

[o] *If the Owner cannot be found, it is the ſame thing as if the Thing belonged to no body.* See the third Article. See the firſt Article of the firſt Section, and the firſt and ſecond Articles of the ſecond Section of Engagements which are formed by Accidents.

XI.

11. *Or a Treaſure.*

Altho' Treaſures be not of the number of Things which are loſt or relinquiſhed, or which never belonged to any body, yet they who find them acquire the Poſſeſſion and Property of them on the terms regulated by the Laws. We call that a Treaſure, which hath been hid in ſome place that it might not be found, and of which the Proprietor, or his Heirs, or others having his Right, do not appear; which has the ſame effect as if no body had any right to them[p]. But if they ſhould appear, it would be a Theft not to reſtore the Treaſure to them[q].

[p] Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat. Sic enim fit ejus qui invenerit, quòd non alterius ſit. *l.* 31. §. 1. *ff. de acq. rer dom.*

Si in locis fiſcalibus, vel publicis, religioſiſve, aut in monumentis theſauri reperti fuerint, Divi fratres conſtituerunt, ut dimidia pars ex iis fiſco vindicaretur. Item ſi in Cæſaris poſſeſſione repertus fuerit, dimidiam æquè partem fiſco vindicari. *l.* 3. §. *penult. ff. de jur. fiſci.*

Qui theſaurum in proprio fundo invenit, totius fit dominus: qui in alieno, cum domino fundi partitur, & dimidiam retinet. *l. un. C. de Theſaur.* §. 39. *inſt. de rer. diviſ. l.* 7. §. 12. *ff. ſol. matr. V. Nov. Leon.* 51.

[q] Alioquin ſi quis aliquid vel lucri cauſâ, vel metûs, vel cuſtodiæ condiderit ſub terra, non eſt theſaurus: cujus etiam furtum fit. *d. l.* 31. §. 1. *ff. de acq. rer. dom. v. l.* 67. *ff. de rei. vind. & l.* 15. *ff. ad exhibendum.*

Our Uſage as to Treaſures, is different from the Roman *Law. But ſeeing this matter does not come within the deſign of this Book, and that it is of a large extent, we ſhall not explain it here.*

XII.

12. *What Nature adds to a Ground, belongs to the Maſter of the Ground.*

The Proprietors of Lands acquire the Poſſeſſion of that which Nature adds to them, and which augments the Land, and is as it were an Acceſſion to it. Thus the inſenſible accretion which may happen to a Ground bordering on a River, by the effect of the Water, accrues to the Maſter of the ſaid Ground. But if an Inundation, or the change of the channel of a River, ſeparates one part of a Ground, and joins it to a neighbouring Ground, the property of the ſaid part, will belong ſtill to its firſt Maſter. For whereas what is added to a Ground by an imperceptible accretion, cannot be diſtinguiſhed in order to be reſtored to another Maſter, and may perhaps come from ſome other place than the neighbouring Ground; one may diſtinguiſh in thoſe ſudden changes that which belongs to every one. Thus all theſe ſorts of accretions augment the Ground only in ſo much as does not appear to remain ſtill to its firſt Maſter[r].

[r] Quòd per alluvionem agro noſtro flumen adjicit, jure gentium nobis acquiritur. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intelligere non poſſimus, quantùm quoquo momento temporis adjiciatur. Quod ſi vis fluminis partem aliquam ex tuo prædio detraxerit, & meo prædio attulerit, palam eſt eam tuam permanere. *l.* 7. §. 1. & 2. *ff. de acq. rer. dom.*

Quamvis fluminis naturalem curſum opere manufacto alio non liceat avertere, tamen ripam ſuam adverſus rapidi amnis impetum munire, prohibitum non eſt. Et cùm fluvius priore alveo derelicto, alium ſibi facit, ager quem circumit, prioris domini manet. Quod ſi paulatim ita auferat ut alteri parti applicet, id alluvionis jure ei quæritur cujus fundo acceſſit. *l.* 1. *C. de alluvion.* See the ſixth Article of the firſt Section of Engagements which are formed by Accidents.

XIII. Build-

XIII.

The Poſſeſſion of Buildings is acquired to the Maſter of the Ground.

Buildings belong to thoſe who are Maſters of the Ground on which they are built. For the Edifice is an acceſſion which is added to the Ground, and which cannot take away the Ground from the Proprietor. Thus when one perſon builds on the Ground of another, the Building is acquired to the Maſter of the Ground. And when one builds on his own Ground with Materials that are not his own, he becomes Maſter of them: for ſeeing the Materials cannot be ſeparated from the Ground but by demoliſhing the Building, which it is for the Publick Good not to ſuffer; the Poſſeſſion of the Building belongs to the Maſter of the Ground, and by vertue of that Poſſeſſion the Property, with the charge of paying the value of the Materials. But if there was put into this Building any thing of great value which it would be juſt to ſeparate from it, ſuch as a Statue, or other Ornament, it would be reſtored to the perſon who was Maſter of it. For the Right of hindering the ſeparation of the Materials, is limited to what is neceſſary for the Building, and which being a part thereof, cannot be eaſily ſeparated from it. But if he who had made uſe of Materials which were not his own, had done it knaviſhly, he would be liable to Coſts and Damages, and to other Penalties which the quality of the Fact might deſerve[f].

[f] Cùm in ſuo loco aliquis aliena materia ædificaverit, ipſe dominus intelligitur ædificii: quia omne quod inædificatur ſolo cedit. Nec tamen ideò is qui materiæ dominus fuit, deſiit ejus dominus eſſe: ſed tantiſper neque vindicare eam poteſt, neque ad exhibendum de ea agere propter legem xii. tab. qua cavetur, ne quis tignum alienum ædibus ſuis junctum eximere cogatur. Sed duplum pro eo præſtet. Appellatione autem tigni, omnes materiæ ſignificantur, ex quibus ædificia fiunt. *l.* 7. §. 10. *ff. de acq. rer. dom.*

Ex diverſo ſi quis in alieno ſolo ſua materia ædificaverit, illius ſit ædificium cujus & ſolum eſt. *d. l.* §. 12.

Certè, ſi dominus ſoli petat ædificium, nec ſolvat pretium materiæ, & mercedem fabrorum, poterit per exceptionem doli mali repelli. *d.* §. 12.

XIV.

14. It is the ſame thing in reſpect of what is planted.

It is the ſame thing with reſpect to what is planted in a Ground, as it is with Buildings: and if it happens that the Maſter of a Ground has planted in it Trees which were not his own, or that the Owner of the Trees has planted them in the Ground of another perſon, and that they have taken root in it, they will belong to the Maſter of the Ground[t]: But he will be obliged to pay the price of the Trees, and be liable to Coſts and Damages, and other Penalties, if there be ground for it, according to the Rule explained in the foregoing Article.

[t] Si alienam plantam in meo ſolo poſuero, mea erit. Ex diverſo, ſi meam plantam in alieno ſolo poſuero, illius erit: ſi modo utroque caſu radices egerit. Antequam enim radices ageret, illius permanet, cujus & fuit. *l.* 7. §. 13. *ff. de acq. rer. dom. l.* 5. §. 3. *ff. de rei vindic. l.* 11. *C. eod.*

XV.

15. Poſſeſſion of what is added to a Moveable.

The ſame reaſon which makes the Proprietor of a Ground to be Maſter of what is built or planted in it, holds likewiſe with reſpect to Moveable Things, and makes that which becomes inſeparable from the Moveable, to become the Poſſeſſion and Property of him who is Maſter of the Moveable. Thus a piece which is part of a Moveable that is made up of ſeveral Pieces put together, is acquired to him who owns the Moveable, he paying the price which that Piece might have been worth by it ſelf. For what cannot be ſeparated from the Whole, belongs to him who is Maſter of the reſt. But if what is added be of greater value than the Moveable, ſuch as a Picture upon a Canvas; the value and dignity of the moſt precious Thing, will draw to it the other which is of leſs value[u]: And the Painter will be Maſter of the Picture, he paying the price of the Canvas. And it would be the ſame thing, if of a Matter of little value, there had been made a precious Work, ſuch as a Statue of Marble or Braſs, or a precious Compoſition made of ſeveral Matters of ſmall value. For in all theſe caſes, although there had been nothing added to the ſaid Materials beſides the Art which made the Work out of them; he who gives being to a Thing, ought to be Maſter of it[x]: unleſs the Workmanſhip were of leſs value than the Matter, ſuch as the engraving of Seals on precious Stones. Thus in order to judge to whom the Things ought to belong after theſe ſorts of changes, it is neceſſary to conſider the circumſtances of the quality of the Work, of that of the Matter, of the cauſes for which the Work has been made, if it was for the uſe of the perſon who made it, or of the Maſter of the matter, or of ſome other perſon who had beſpoke it. And by all theſe views, and others of the like nature, one may determine who ought to have the Thing; and likewiſe regulate what he

he who keeps the Thing is to give either for the Matter or for the Workmanſhip.

[s] Si quis rei ſuæ alienam rem ità adjecerit, ut pars ejus fieret, veluti ſi quis ſtatuæ ſuæ, brachium aut pedem alienum adjecerit, aut ſcypho anſam, vel fundum, vel candelabro ſigillum, aut menſæ pedem, dominum ejus totius rei effici: verèque ſtatuam ſuam dicturum, & ſcyphum. *l.* 23. §. 2. *ff. de rei vindic.*

Literæ quoque, licet aureæ ſint, perinde chartis membraniſque cedunt, ac ſolo cedere ſolent, ea quæ ædificantur aut ſeruntur. *l.* 9. §. 1. *ff. de acq. rer. dom.*

Sed non uti literæ chartis membraniſve cedunt, ita ſolent picturæ tabulis cedere: ſed ex diverſo placuit, tabulas picturæ cedere. *d. l.* §. 2.

In omnibus igitur iſtis in quibus mea res per prævalentiam alienam rem trahit, meámque efficit, ſi eam rem vindicem, per exceptionem doli mali cogar pretium ejus quod acceſſerit dare. *l.* 23. §. 4. *ff. de rei vindic.*

We have not put down in this Article the Example of Writing upon Paper; for the Text cited on this Article ought to be underſtood either of ſome other Matter more precious than our Paper, or of Writing which would not deſerve that the Matter upon which it is written ſhould be taken away from the Maſter, as that which was written in Table-Books made of Wax in order to be blotted out. But as to Writing on our Paper, it is moſt certain that the Maſter of the Paper would not become Maſter of what ſhould be writ on it, although it were only a bare Letter: and much leſs if it were Writings or Deeds of any conſequence.

[t] Vel quæ ipſi ut in natura eſſent fecimus. *l.* 3. §. 21. *ff. de acq. vel amit. poſſ.*

See another Caſe where a Thing is compoſed of a mixture of divers Matters which did belong to ſeveral perſons, in the ſeventh Article of the firſt Section of Engagements which are formed by Accidents.

XVI.

16. *In what Poſſeſſion conſiſts.*

All that has been ſaid in the preceding Articles relates to the Cauſes which may give us the Poſſeſſion, or the Right to poſſeſs: And we are now to conſider how one becomes Poſſeſſor, and the ways of entring upon a real and actual Poſſeſſion. Seeing the uſe of Poſſeſſion is to exerciſe the Right of Property, it implies three things, a juſt cauſe of poſſeſſing as Maſter, the intention to poſſeſs in this quality, and detention. This intention is not underſtood of that of an Uſurper, or of a knaviſh Poſſeſſor, who have the intention to poſſeſs as Maſter, but of him who is in reality Maſter, or who poſſeſſes ſo as to have juſt reaſon to believe that he is Maſter. The detention is underſtood not only of him who has the thing in his own hands, or in his power; but likewiſe of him who holds it by the intervention of other perſons, ſuch as a Depoſitary, a Tenant, a Farmer. Without the intention there is no Poſſeſſion: Thus the poſſeſſor of a Ground in which there is a Treaſure unknown to him, does not poſſeſs the Treaſure, although he poſſeſſes the place in which it is. Without the detention, the intention is uſeleſs, and does not make the Poſſeſſion: Thus he whoſe Thing has been ſtolen, does not poſſeſs it any longer. And without a juſt cauſe the detention is only an Uſurpation [y].

[y] Cogitatione domini, opinione domini. *See the eighth Article of the firſt Section.*

Apiſcimur poſſeſſionem corpore, & animo: neque per ſe animo, aut per ſe corpore. *l.* 3. §. 1. *ff. de acq. vel amitt. poſſeſſ.*

Solo animo non poſſe nos acquirere poſſeſſionem, ſi non antecedat naturalis poſſeſſio. *d. l.* 3. §. 3. *l.* 4. *C. de acq. & retin. poſſ.*

Nulla poſſeſſio acquiri niſi animo, & corpore poteſt. *l.* 8. *ff. eod.*

Sciendum eſt adverſus poſſeſſorem hac actione (ad exhibendum) agendum: non ſolum eum qui civiliter, ſed & eum qui naturaliter incumbat poſſeſſioni. *l.* 3. §. *ult. ff. ad exhibend.* Naturalis poſſeſſio. *l.* 3. §. 13. *ff. de acq. vel amitt. poſſ.*

We have explained in the Preamble, the difference between this Natural Poſſeſſion, and that which the Laws call Civil. Quod Brutus & Manilius putant, eum qui fundum longa poſſeſſione cepit, etiam theſaurum cepiſſe, quamvis neſciat in fundo eſſe, non eſt verum. Is enim qui neſcit, non poſſidet theſaurum, quamvis fundum poſſideat. *l.* 3. §. 3. *eod. V. l.* 30. *eod.* See the firſt Article of the firſt Section. See the twenty third Article.

XVII.

17. *Poſſeſſion which one takes of his own accord, without a preceding Right.*

The Poſſeſſion of the Things which we acquire by their falling into our hands, ſuch as that which we find, and which has no Maſter, that which we take in hunting, and thoſe things which we have a Right to take from the Owners, as the Spoil of an Enemy, is acquired by the bare fact of our laying our hands upon them [z].

[z] Lapilli, & gemmæ, & cætera quæ in litore maris inveniuntur, jure naturali ſtatim inventoris fiunt. §. 18. *inſt. de rer. diviſ.*

Simul atque capta fuerint, jure gentium ſtatim illius eſſe incipiunt. §. 12. *inſt. eod.* See the third Article of this Section.

XVIII.

18. *Poſſeſſion which is only taken by delivery of the thing.*

The Poſſeſſion of Things which one acquires from other perſons who have them in their cuſtody, does not paſs to the Purchaſer but by the delivery which is made of them to him by the Seller, Donor, or other perſon from whom he purchaſes them. And if the ſaid perſon ſhould refuſe to deliver them, the Purchaſer cannot take poſſeſſion of the Thing by force, but ought to have recourſe to a Court of Juſtice for obtaining it [a].

[a] Traditionibus, & uſucapionibus dominia rerum, non nudis pactis transferuntur. *l.* 20. *C. de pact.*

Res quæ traditione noſtræ fiunt, jure gentium nobis acquiruntur. Nihil enim tam conveniens eſt naturali æquitati, quàm voluntatem domini volen-

tis

tis rem ſuam in alium transferre, ratam haberi. *l.* 9. §. 3. *ff. de acq. rer. dom.*

Si vendidero, nec tradidero rem, ſi non voluntate mea nactus ſis poſſeſſionem, non pro emptore poſſides, ſed prædo es. *l.* 5. *ff. de acq. vel amitt. poſſeſſ.* See the ſeventh Article of the third Section.

XIX.

19. *In what conſiſts the Delivery which gives Poſſeſſion.*

The delivery that is neceſſary for putting into Poſſeſſion the perſon who purchaſes a Thing of another, conſiſts in that which makes it to paſs out of the power of the one into that of the other. Thus Moveables may be delivered from hand to hand: or one may tranſport them from one place to another, and put them into the poſſeſſion of him who becomes Maſter of them [b].

[b] *See the following Article, and the fifth and ſixth Articles of the ſecond Section of the Contract of Sale.*

XX.

20. *Delivery and taking of Poſſeſſion.*

The delivery, and the taking poſſeſſion of Moveables, does not always require that they ſhould be removed from one place to another; but it is ſufficient for putting them into the poſſeſſion of the new Maſter, either to leave them in his hands, if he had them already, as if a Depoſitary ſhould buy what was depoſited with him: or if they are kept in a place under Lock and Key, to deliver to him the Key. But if they are neither kept under Lock and Key, nor eaſy to be tranſported, ſuch as Materials for a Building, one takes Poſſeſſion thereof by a bare view of them, and by the intention of him who parts with them, and of him who becomes Maſter of them. And there is alſo a kind of tacit delivery, which is made by the bare will of the contracting parties, as among thoſe who join their Goods in Partnerſhip. For from the moment of their agreement, each of them begins to poſſeſs by the others the Goods which they are willing to have in common [c].

[c] Non eſt corpore & actu neceſſe apprehendere poſſeſſionem. Sed etiam oculis, & affectu. Et argumento eſſe eas res quæ propter magnitudinem ponderis moveri non poſſunt, ut columnas. Nam pro traditis eas haberi, ſi in re præſenti conſenſerint. *l.* 1. §. 21. *ff. de acq. vel amitt. poſſeſſ.*

Si quis merces in horreo repoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, tranſferre proprietatem mercium ad emptorem. *l.* 9. §. 6. *ff de acq. rer. dom.*

Vina tradita videri, cùm claves cellæ vinariæ emptori traditæ fuerint. *l.* 1. §. 21. *ff. de acq. vel amitt. poſſeſſ.*

Interdùm ſine traditione, nuda voluntas domini ſufficit ad rem transferendam. Veluti ſi rem quam commodavi, aut locavi tibi aut apud te depoſui, vendidero tibi. Licet enim ex ea cauſa tibi eam non tradiderim, eò tamen quòd patior eam ex cauſa emptionis apud te eſſe, tuam efficio. *l.* 9. §. 5. *ff. de acq. rer. dom.* §. 44. *inſt. de rer. diviſ.*

Nerva filius, res mobiles quatenùs ſub cuſtodia noſtra ſint hactenùs poſſideri, id eſt, quatenùs, ſi velimus naturalem poſſeſſionem nanciſci, poſſimus. *l.* 3. §. 13. *ff. de acq. vel amitt. poſſeſſ.* Simul atque cuſtodiam poſuiſſem. *l.* 51. *eod.*

Res quæ coëuntium ſunt continuò communicantur: quia licet ſpecialiter traditio non intervenìat, tacita tamen creditur intervenire. *l.* 1. §. 1. *& l.* 2. *ff. pro ſocio.* See the ſixth Article of the ſecond Section of the Contract of Sale.

XXI.

21. *Delivery and taking Poſſeſſion of Immoveables.*

As to Immoveables, thoſe who alienate them either by Sale, or by other Titles, ſtrip themſelves of the Poſſeſſion by declaring only either that they will not poſſeſs any longer, or that if they hold ſtill the Land or Tenement, it ſhall be only precariouſly, or by delivering the Keys, if it is a place that is locked up. And the Poſſeſſion paſſes to the new Maſter by the bare effect of the intention to poſſeſs, joined to ſome Act which denotes his Right, as if he goes in perſon to the Land or Tenement, to take poſſeſſion of it as Maſter, altho' he do not go over all the parts of it. And one may likewiſe take Poſſeſſion of a Land or Tenement by a bare view thereof [d].

[d] *See the ſeventh Article of the ſecond Section of the Contract of Sale.* Apiſcimur poſſeſſionem corpore & animo, neque per ſe animo, aut per ſe corpore. Quod autem diximus, *& corpore, & animo acquirere nos debere poſſeſſionem*, non utique ita accipiendum eſt, ut qui fundum poſſidere velit omnes glebas circumambulet: ſed ſufficit quamlibet partem ejus fundi introire: dùm mente & cogitatione hac ſit, uti fundum uſque ad terminum velit poſſidere. *l.* 3. §. 1. *ff. de acq. vel amitt. poſſ.*

Si vicinum mihi fundum mercato, venditor in mea turre demonſtret, vacuamque ſe poſſeſſionem tradere dicat, non minùs poſſidere cepi, quam ſi pedem finibus intuliſſem. *l.* 18. §. 1. *ff. de acq. vel amitt. poſſ.*

According to the Uſage in France, *Inſtruments of Seiſine, or taking Poſſeſſion, are drawn up by Publick Notaries, in order to make proof thereof. Which ſerves to mark the time from which Preſcription begins to run, as well againſt thoſe who ſhould pretend to be Proprietors, as againſt perſons who have other Rights which are to laſt only a certain time, ſuch as a Power of Redemption belonging to the Kindred of a Family, or reſerved by the Contract of Sale.*

XXII.

22. *Delivery and taking poſſeſſion of Things which conſiſt in Rights.*

The delivery of that which conſiſts in Rights, ſuch as a Juriſdiction, a Right which the Lord of a Mannor has to oblige all his Vaſſals and Tenants to make uſe of his Mills and Ovens, an Office, a Service, a Rent, and other Goods of this nature, is made by giving up the Titles, if there are any; and if there be no Titles, by the bare effect of the purchaſe, together with the common intention of the Contracters that the Purchaſer ſhould put himſelf into Poſſeſſion. And one takes Poſſeſſion by Acts which may

may have that effect. Thus one takes poſſeſſion of a Juriſdiction, by naming Officers to exerciſe it, receiving the Fines and Confiſcations, and by exerciſing the other Rights which depend thereon. Thus one takes poſſeſſion of an Office, by taking the Rank and Place which it intitles one to, and by exerciſing ſome Function thereof. Thus one takes poſſeſſion of a Service by uſing it for the purpoſes for which it was intended, and of a Rent which one has acquired, or of another Right, by giving notice of the Aſſignment, or of the Title of the Purchaſe, to the Debtor, and by the enjoyment thereof[e].

[e] *See the fifth Article of the firſt Section of this Title, and the ninth Article of the ſecond Section of the Contract of Sale.*

XXIII.

23. *One can poſſeſs only a Thing which is certain and determined.*

Whatever may be the nature of the Thing, which one ought to have the Poſſeſſion of, whether it be Moveable, or Immoveable, or ſome Right, one can never poſſeſs but a Thing which is certain and determined; that is, ſuch as one may know preciſely what has been poſſeſſed. Thus one may poſſeſs either an entire Field, or a diſtinct part of the ſaid Field, as ſuch a particular Acre, or even an undivided Portion thereof, as a Fourth Part, or a Moiety, enjoying the Fruits thereof in proportion. But one cannot poſſeſs an uncertain portion of a Ground or Field, as if one had purchaſed a portion not yet determined which one had in a Ground, ſuch as ſhould appear to belong to him, his Right not being as yet adjuſted. For Poſſeſſion implying the detention of the Thing, one cannot poſſeſs, no more than he can hold indefinitely an uncertain Thing, which one does not know what it conſiſts in[f].

[f] Incertam partem rei poſſidere nemo poteſt. Veluti ſi hac mente ſis, ut quidquid Titius poſſidet, tu quoque velis poſſidere. *l.* 3. §. 2. *ff. de acquir. vel amitt. poſſeſſ.*

Locus certus ex fundo & poſſideri, & per longam poſſeſſionem capi poteſt: & certa pars pro indiviſo, quæ introducitur vel ex emptione, vel ex donatione, vel qualibet alia ex cauſa. Incerta autem pars nec tradi, nec capi poteſt: veluti ſi ità tibi tradam, *quidquid mei juris in eo fundo eſt*. Nam qui ignorat, nec tradere, nec accipere id quod incertum eſt, poteſt. *l.* 26. *eod.* See the ſixteenth Article.

XXIV.

24. *How the Poſſeſſion is preſerved.*

The Poſſeſſion being once acquired, the Poſſeſſor retains it afterwards by the bare effect of his intention to keep it, joined to the Right and Liberty of uſing the Thing when he pleaſes; whether he puts in execution the ſaid Liberty by making uſe of the Thing, or whether he lets it alone without touching it. Thus one poſſeſſes not only the Lands which he cultivates, and of which he gathers the Fruits; but alſo thoſe which he lets lie uncultivated, and which he never goes near[g], provided only that he do not ſuffer the Poſſeſſion of them to be uſurped by other perſons.

[g] Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poteſt. Si ergò prædiorum deſertam poſſeſſionem, non derelinquendi affectione, tranſacto tempore non contuliſti, ſed metus neceſſitate culturam eorum diſtuliſti, præjudicium tibi ex tranſmiſſi temporis injuria generari non poteſt. *l.* 4. *C. de acq. & ret. poſſ.*

XXV.

25. *One retains the Poſſeſſion by other perſons.*

The Proprietor preſerves likewiſe his Poſſeſſion by the hands of other perſons who poſſeſs in his name, ſuch as a Farmer, a Depoſitary, he who has borrowed a Thing, the Creditor who has it in pawn, the Uſufructuary, and other perſons who hold the Things by Titles of the like nature[h].

[h] Generaliter quiſquis omninò noſtro nomine ſit in poſſeſſionem, veluti procurator, hoſpes, amicus, nos poſſidere videmur. *l.* 9. *ff. de acq. vel am. poſſ.* See the eighth, ninth, and tenth Articles of the firſt Section.

XXVI.

26. *One may take Poſſeſſion either himſelf, or by other perſons.*

One may take Poſſeſſion of a Thing either himſelf, or by a Factor, or Agent. And he who gives it away, may likewiſe deliver it either himſelf, or by his Agent. And Minors acquire the Poſſeſſion by their Guardians, as the Guardians may alſo deliver the Goods of Minors which are alienated[i].

[i] Apiſcimur poſſeſſionem per noſmetipſos. *l.* 1. §. 2. *ff. de acq. vel amitt. poſſ.* Per procuratorem, tutorem, curatoremve, poſſeſſio nobis acquiritur. *d. l.* 1. §. 20. *l.* 20. §. 2. *ff. de acq. rer. dom. l.* 13. *eod. d. l.* §. 1.

XXVII.

27. *The Poſſeſſor ſucceeds to the Right of his Author.*

He who enters into the Poſſeſſion of a Thing which he acquires from another, ſucceeds to the ſame Right, and poſſeſſes neither more nor leſs than his Author did poſſeſs. Thus he who purchaſes Lands, and is put into poſſeſſion of them, will poſſeſs in the ſame manner as the Seller did, the Services which may be due to the ſaid Lands, and will be ſubject to the Services which they may owe.

[l] Traditio nihil ampliùs transferre debet, vel poteſt ad eum qui accipit, quàm eſt apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert. Si non habuit, ad eum qui accipit nihil transfert. Quoties autem dominium

transfertur ad eum qui accipit, tale transfertur, quale fuit apud eum qui tradit. Si ſervus fuit fundus, cum ſervitutibus tranſit: ſi liber, uti fuit: & ſi fortè ſervitutes debebantur fundo qui traditus eſt, cum jure ſervitutum debitarum transfertur. *l.* 20. *ff. de acq. rer. dom.*

XXVIII.

28. *One loſes the Poſſeſſion of what one alienates, or relinquiſhes.*

As Poſſeſſion is acquired by the intention to poſſeſs, joined with the actual detention of the Thing, it is likewiſe loſt by the intention of not poſſeſſing any longer, the Owner putting out of his hands and out of his power that which he did poſſeſs; whether it be that he alienates it to another, or relinquiſhes it, he parting therewith with intention never to have it any more. And the bare intention not to poſſeſs any longer, is of it ſelf ſufficient to deprive one of the Poſſeſſion, as it happens to the Seller whom the Buyer intreats to keep for ſome time the Thing that is ſold; for it is not any longer the Seller who poſſeſſes it, but the Buyer who poſſeſſes through him [m].

[m] Ferè quibuſcumque modis obligamur, iiſdem in contrarium actis liberamur. Cùm quibus modis acquirimus, iiſdem in contrarium actis amittimus. Ut igitur nulla poſſeſſio acquiri niſi animo & corpore poteſt: ita nulla amittitur, niſi in qua utrumque in contrarium actum. *l.* 153. *ff. de reg. jur. l.* 8. *ff. de acq. vel. amitt. poſſ.* Amitti & animo ſolo poteſt (poſſeſſio) quamvis acquiri non poteſt. *l.* 3. §. 6. *eod.* Pro derelicto habetur quod dominus eâ mente abjecerit, ut id numero rerum ſuarum eſſe noluit. §. 47. *inſt. de rer. diviſ.*

XXIX.

29. *Things that are loſt, and thoſe which are thrown into the Sea in a danger of Shipwrack, are not relinquiſhed.*

We muſt not reckon in the number of Things relinquiſhed, thoſe which one has loſt, nor that which is thrown into the Sea in a danger of Shipwrack to ſave the Veſſel, nor thoſe which are loſt in a Shipwrack. For altho' the Owners of thoſe things loſe the Poſſeſſion of them, yet they retain the Property, and the Right to recover them. Thus thoſe who find Things of this kind, cannot make themſelves Maſters of them; but are obliged to reſtore them, purſuant to the Rules explained in their place [n].

[n] Idem ait, & ſi naufragio quid amiſſum ſit, non ſtatim noſtrum eſſe deſinere. *l.* 44. *ff. de acq. rer. dom.*

Non eſt in derelicto quod ex naufragio expulſum eſt, ſed in deperdito. *l.* 21. §. 1. *ff. de acq. vel amitt. poſſ.*

Idem juris eſſe exiſtimo in his rebus quæ jactæ ſunt. Quoniam non poteſt videri id pro derelicto habitum, quod ſalutis cauſa interim dimiſſum eſt. *d. l.* §. 2. See the firſt Article of the firſt Section, and the firſt Article of the ſecond Section of Engagements which are formed by Accidents.

XXX.

30. *One loſes his*

ther comes to poſſeſs, and has been in poſſeſſion for the ſpace of a year. For a year's Poſſeſſion even in the perſon of an Uſurper, if it has been peaceable and unmoleſted, makes him to be conſidered as a juſt Poſſeſſor, and even as Maſter, until the true Owner make out his right in order to recover his Poſſeſſion [o].

Poſſeſſion by the Poſſeſſion of another perſon.

[o] Vi pulſos reſtituendos eſſe, interdicti exemplo, ſi needum utilis annus exceſſit, certiſſimi juris eſt. *l.* 2. *C. unde vi.* See the eighteenth Article of the firſt Section.

SECT. III.

Of the Effects of Poſſeſſion.

The CONTENTS.

1. *The firſt effect of Poſſeſſion is the Enjoyment.*
2. *Another effect, is to acquire in certain caſes the property at the ſame time that one enters upon poſſeſſion.*
3. *Another effect, to acquire the Property by a long poſſeſſion.*
4. *Another effect, is to make the Poſſeſſor be conſidered as Maſter.*
5. *Effect of a fair and honeſt Poſſeſſion.*
6. *Effect of a knaviſh Poſſeſſion.*
7. *Poſſeſſion by force.*

I.

1. *The firſt effect of Poſſeſſion is the Enjoyment.*

THE moſt natural effect of Poſſeſſion, is to put the Property in uſe, and to give to the Proprietor the actual exerciſe of his Right, by enjoying the Thing, and diſpoſing of it. And it is for the ſake of this uſe, that the Poſſeſſion is naturally linked to the Property [a].

[a] Proprietas à poſſeſſione ſeparari non poteſt. *l.* 8. *C. de acq. & ret. poſſ.* See the ſecond Article of the firſt Section.

II.

2. *Another effect, is to acquire in certain caſes the property at the ſame time that one enters upon poſſeſſion.*

This is alſo another effect of Poſſeſſion, that in many caſes, explained in the foregoing Section, it gives the Property. And it is even by Poſſeſſion that Men naturally began to acquire the dominion of Things [b]. Thus, Poſſeſſion is in one ſenſe the cauſe of Property; and on the contrary it is the effect of it in another ſenſe, in the caſes where one acquires the Property before they can enter into Poſſeſſion; as if one buys a thing which is not delivered at the time of the purchaſe. For in this caſe, the Property gives the right to have the Poſſeſſion.

[b] Dominium rerum ex naturali poſſeſſione cœpiſſe, Nerva filius ait. Ejuſque rei veſtigium remanere de his quæ terra, mari, cæloque capiuntur: nam hæc protinùs eorum fiunt, qui primi poſſeſſionem eorum apprehenderint. *l.* 1. §. 1. *ff. de acq. vel amitt. poſſ.*

Statim inventoris fiunt. §. 18. *inſt. de rer. diviſ.* See the firſt Articles of the ſecond Section.

III.

3. Another effect, to acquire the Property by a long poſſeſſion.

Poſſeſſion hath likewiſe this effect, that if in the time that one acquires it, the Property is not joined therewith, it follows the Poſſeſſion, not in the ſame inſtant that one enters into Poſſeſſion, as in the caſe mentioned in the preceding Article; but by a Poſſeſſion that is continued during the time regulated for preſcribing. Thus, he who buys a Thing which he believes the Seller to be Owner of, and yet belongs to another, does not become Maſter of it in the moment that it is delivered to him by the Seller; but if he continues to poſſeſs it during the time limited for Preſcription, he will become Maſter of it, even altho' the perſon of whom he bought it had poſſeſſed it knaviſhly [c].

[c] Jure civili conſtitutum fuerat, ut qui bonâ fide ab eo qui dominus non erat, cùm crederet eum dominum eſſe, rem emerit, vel ex donatione, aliâve quavis juſta cauſa acceperit, is eam (uſucaperet) *inſt. de uſucap. & long. temp. præſcr. V. l.* 36. *ff. de uſu & uſufr. leg.*

Quamvis (poſſeſſor) malâ fide poſſideat, quia intelligit ſe alienum fundum occupâſſe, tamen ſi alii bonâ fide accipienti tradiderit, poterit ei longâ poſſeſſione res acquiri. §. 7. *inſt. de uſucap. & long. temp. præſc.*

IV.

4. Another effect, is to make the Poſſeſſor be conſidered as Maſter.

This is likewiſe another effect of Poſſeſſion, that the Poſſeſſor is conſidered as Maſter of the Thing, altho' it may happen that he is not ſo [d].

[d] *See the firſt Article of the fourth Section of Proofs.*

V.

5. Effect of a fair and honeſt Poſſeſſion.

The Poſſeſſion of him who poſſeſſes with a good conſcience has this effect, that while he is ignorant of any better right to the thing than his own, he enjoys and makes his own the Fruits which he gathers, and not only thoſe which he reaps from the Ground by his own induſtry, but likewiſe thoſe which the Ground produces without culture. For as has been remarked in another place, his ſincere and upright belief of his own Right is to him inſtead of Truth, and makes him look upon himſelf, and be looked upon by others, as right Owner of the Thing, whilſt his upright belief is not interrupted by any demand. And if it happens that the Thing is evicted from him, he ſhall reſtore no part of what he enjoyed before the demand [e]. But he will be obliged to reſtore the Fruits which he reaped after the demand. For he ought to have acquieſced to the Demand, ſeeing it was juſt, as appears by the event of the Eviction; and after the demand he could not pretend any longer to be ignorant of the right of the true Owner, which ignorance was the cauſe of his honeſty and integrity [f].

[e] Bonæ fidei emptor non dubiè percipiendo fructus etiam ex aliena re ſuos interim facit, non tantùm eos qui diligentia & opera ejus provenerunt, ſed omnes. Quia quod ad fructus attinet, loco domini penè eſt. *l.* 48. *ff. de acq. rer. dom.*

Bonæ fidei poſſeſſor in percipiendis fructibus id juris habet, quod dominis prædiorum tributum eſt. *l.* 25. §. 1. *ff. de uſur.* Bona fides tantùmdem poſſidenti præſtat, quantùm veritas, quoties lex impedimento non eſt. *l.* 136. *ff. de reg. jur.*

[f] *See the fifth and ſixth Articles of the third Section of Intereſt, Coſts, and Damages, &c. See the ninth and tenth Articles of the ſame Section, touching the caſes where the honeſt and upright Poſſeſſor reſtores the Fruits gathered before the demand.*

VI.

6. Effect of a knaviſh Poſſeſſion.

The Poſſeſſion of him who poſſeſſes knaviſhly, has this effect, that it hinders him from preſcribing [g], and obliges him to reſtore not only the Fruits which he has enjoyed, but likewiſe thoſe which a careful Huſband might have reaped from the Land or Tenement which he was in poſſeſſion of [h].

[g] Uſucapio non comperit (furi & ei qui per vim poſſidet) quia ſcilicet malâ fide poſſident. §. 3. *inſt. de uſucap. & long. temp. præſcript.* Non capiet longa poſſeſſione (qui) ſcit alienum eſſe. *l.* 3. §. 3. *ff. de acq. vel am. poſſ.*

[h] *See the thirteenth Article of Intereſt, Coſts and Damages.*

VII.

7. Poſſeſſion by force.

All that has been ſaid of Poſſeſſion in this and the preceding Sections, ought not to be underſtood of the Poſſeſſion of Uſurpers, and of knaviſh Poſſeſſors, who know they poſſeſs what they have no right to. For not only are they not conſidered as Poſſeſſors, but they are puniſhed according to the quality of their attempt. And it is the ſame thing with reſpect to thoſe who being commanded by a Court of Juſtice to quit their Poſſeſſion, altho' it may have been juſt in its beginning, do not obey the Sentence. And they are turned out of poſſeſſion with all the Force that their reſiſtance may make neceſſary, and undergo the Penalties which their diſobedience may deſerve. But this force cannot be employed except by Authority of Juſtice, which allows of no other Force except what is in her own hands [i].

[i] Ne

[a] Ne quid per vim admittatur, etiam legibus Juliis proſpicitur publicorum & privatorum, nec non & conſtitutionibus principum. *l.* 1. §. 2. *ff. de vi & de vi arm.*

Qui reſtituere juſſus judici non paret, contendens non poſſe reſtituere, ſi quidem habeat rem, manu militari officio judicis ab eo poſſeſſio tranſfertur. *l.* 68. *ff. de rei vindic.*

SECT. IV.

Of the nature and uſe of Preſcription, and of the manner in which it is acquired.

The nature and uſe of Preſcriptions.

NO body is ignorant of this advantage, among others, of Preſcriptions, that they aſcertain to Poſſeſſors, the Property of Eſtates, after a Poſſeſſion that has laſted during the time regulated by Law. But altho' Preſcriptions ſeem naturally to be neceſſary for this uſe, yet they were not ſo by the Divine Law, which ordained that the Eſtates which were alienated ſhould return to the firſt Poſſeſſors, every fiftieth year, to be computed from the day of eſtabliſhing that Uſage, and that one ſhould have power to alienate only the Enjoyment of his Eſtate, for the number of years which ſhould remain from the day of the Alienation, to the ſaid fiftieth year, which was to reſtore all Eſtates to the Families of the firſt Poſſeſſors. And likewiſe theſe Alienations could not be made, except with a perpetual Power of redeeming the Eſtate whenever they would. It was only Houſes ſituated within walled Towns, and which belonged to others than Levites, that could be alienated for ever [a].

[a] *Levit.* xxv. 8.

This Divine Law, which prohibited perpetual Alienations, in order to extinguiſh the deſire of increaſing our Poſſeſſions, aboliſhed by that means Preſcriptions. But the letter of this Law being no longer in force, and Alienations which transfer the Property for ever, being allowed with us, the uſe of Preſcriptions is wholly natural in the ſtate and condition we are in; and ſo neceſſary, that without this remedy every Purchaſer and every Poſſeſſor being liable to be troubled to all eternity, there would never be any perfect aſſurance of a ſure and peaceable Poſſeſſion: And even thoſe who ſhould chance to have the oldeſt Poſſeſſion, would have moſt reaſon to be afraid, if together with their Poſſeſſion they had not preſerved their Titles.

And therefore altho' there were no other reaſon to juſtify the uſe of Preſcriptions, beſides the publick advantage of aſcertaining the quiet and tranquillity of Poſſeſſors; it would be juſt to prevent the Property of Things from being always in an uncertainty, leaving ſtill to the Proprietors a time ſufficient for recovering the poſſeſſion of their Eſtates [b]. But it may be ſaid further, that Preſcriptions have otherwiſe their Juſtice and their Equity founded upon the Principle which has already been remarked, that Poſſeſſion being naturally linked to the Right of Property, it is juſt to preſume, that as it is the Maſter who ought to poſſeſs, ſo he who poſſeſſes ought to be Maſter: and that the ancient Proprietor has not been deprived of his Poſſeſſion, without juſt cauſe [c].

[b] Bono publico uſucapio introducta eſt, ne ſcilicet quarumdam rerum diù, & ferè ſemper incerta dominia eſſent. Cùm ſufficeret dominis ad inquirendas res ſuas ſtatuti temporis ſpatium. *l.* 1. *ff. de uſurp. & uſuc.*

[c] *See the thirteenth Article of the firſt Section.*

Preſcription of all ſorts of Rights.

The ſame reaſons which make that a long Poſſeſſion acquires the Property, and that it ſtrips the ancient Proprietor; make likewiſe that all ſorts of Rights and Acquiſitions are acquired and loſt by the effect of time. Thus, a Creditor who has omitted to demand what is due to him, within the time regulated by the Law, has loſt his Debt, and the Debtor is diſcharged from it. Thus, he who has enjoyed a Rent out of an Eſtate during the time regulated for Preſcription, cannot afterwards be deprived of it, altho' he ſhould have no other Title beſides his long enjoyment of it. Thus, he who has ceaſed to enjoy a Service during the time limited for Preſcription, has loſt the Right to it: and on the contrary, he who enjoys a Service, altho' without a Title, acquires the Right to it by a long enjoyment, unleſs there be ſome Cuſtom which directs otherwiſe [d]. And in general, all ſorts of Pretenſions, and Rights of all kinds whatſoever, are acquired and loſt by Preſcription, unleſs they be ſuch as the Laws have particularly excepted. Thus, we ſee two effects of Preſcription, or rather two ſorts of Preſcription. One which acquires to the Poſſeſſor the property of what he poſſeſſes, and which diveſts the Proprietor of his Right becauſe of his not poſſeſſing: And the other, by which all other kinds of Rights are acquired, or loſt; whe-

ther there be any poſſeſſion of them, as in the caſe of the enjoyment of a Service, or whether there be no poſſeſſion at all, as in the loſs of a Debt for want of demanding it.

[a] *See the eleventh Article of this Section, and the places which are there quoted.*

All theſe ſorts of Preſcriptions by which Rights are acquired or loſt, are grounded upon this preſumption, that he who enjoys a Right is ſuppoſed to have ſome juſt Title to it, without which he had not been ſuffered to enjoy it ſo long: That he who ceaſes to exerciſe a Right, has been diveſted of it for ſome juſt cauſe: And that he who has tarried ſo long time without demanding his Debt, has either received payment of it, or been convinced that nothing was due to him.

Two ſorts of Rules concerning Preſcriptions.

We muſt diſtinguiſh two ſorts of Rules relating to Preſcriptions; thoſe which concern the different manners in which the Laws have regulated the time for preſcribing; and thoſe which reſpect the nature of Preſcriptions, their uſe; that which may be ſubject to Preſcription, and that which is not; that which renders Preſcription juſt or vicious, the perſons againſt whom Preſcription does not run, and what ſort of Poſſeſſion it is that is required for preſcribing; what may interrupt Preſcription, and other matters of the like nature. Theſe are Natural Rules of Equity; but thoſe which mark the times of Preſcriptions are only Arbitrary Laws. For Nature does not fix what time is preciſely neceſſary for preſcribing. So that theſe Rules may be changed, and they are different in divers places: And this diverſity is ſeen even in the *Roman* Law, where Preſcriptions have been differently regulated in different times.

Seeing the deſign of this Book reſpects chiefly the Rules of Equity, we ſhall explain here thoſe which are of this kind in the matter of Preſcriptions: and as to thoſe Rules which regulate only the time of Preſcriptions, we have not thought proper to put them down in Articles, in the Sections of this Title, judging it to be ſufficient to take notice of them here in the Preamble. For beſides that the times of Preſcriptions are differently regulated in many of the Provinces of *France*, there are even ſome of the Provinces which are governed according to the written Law, in which they do not obſerve the ſeveral times limited for Preſcription by the *Roman* Law. Thus, it will be ſufficient to give here a ſhort Abſtract of what was in uſe touching this matter in the time of *Juſtinian*. And it will be eaſy for every one to ſee, in every place, what the uſage of that place is, as to the times of Preſcriptions, and wherein the ſeveral Uſages differ from the *Roman* Law, or agree with it.

Preſcription in Moveables, was acquired in the ſpace of three years[c].

[c] Si quis alienam rem mobilem, ſeu ſe moventem in quacunque terra, ſive in italica, ſive in provinciali, bonâ fide per continuum triennium detinuerit: is firmo jure eam poſſideat, quaſi per uſucapionem eam acquiſitam. *l. un. C. de uſuc. tranſ. inſt. de uſuc. & long. temp. præſcr.*

As to Immoveables, the *Romans* made different diſtinctions in the Preſcription of them.

The fair and honeſt Poſſeſſor, who had a Title, preſcribed by a Poſſeſſion of ten years among thoſe who were preſent, and of twenty years among thoſe who were abſent, altho' the perſon of whom he purchaſed had poſſeſſed it knaviſhly. And they reputed thoſe to be preſent, who had their abode in one and the ſame Province[d].

[d] Super longi temporis præſcriptione, quæ ex decem vel viginti annis introducitur, perſpicuo jure ſancimus ut ſive ex donatione, ſive ex alia lucrativa cauſa, bonâ fide quis per decem, vel viginti annos rem detinuiſſe probetur, adjecto ſcilicet tempore etiam prioris poſſeſſionis memorata longi temporis exceptio ſine dubio ei competat, nec occaſione lucrativæ cauſæ repellatur. *l. 11. C. de præſcr. long. temp.*

Rursùs ſancimus, ut ſi quis malâ fide rem poſſidens, aut per venditionem, aut per donationem, aut aliter hanc rem alienet; qui verò putat eaſdem res competere ſibi, hoc agnoſcens, intra decem annos inter præſentes, & viginti inter abſentes non conteſtatus fuerit, ſecundùm leges emptorem, aut donationem accipientem, aut illum ad quem res alio quolibet modo tranſlatæ ſunt: eum qui tales res habet, firmè eas habere, poſt decennii videlicet inter præſentes, & vicennii inter abſentes diſcurſum. *Nov. 119. c. 7.*

Sancimus itaque—— hoc etenim magis nobis eligendum videtur, ut non in civitate concludatur domicilium, ſed magis provincia, & ſi uterque domicilium in eadem habet provincia, cauſam inter præſentes eſſe videri. *l. ult. C. de præſc. long. temp.*

He who poſſeſſed without a Title, preſcribed by a Poſſeſſion of thirty years; and after that time, he could not be moleſted by the Proprietor[e].

[e] In rem ſpeciales—— actiones ultra triginta annorum ſpatium minimè protendantur. *l. 3. C. de præſc. 30. vel 40. ann.*

Actions, that is, the Right to make Demands in a Court of Juſtice, ſuch as the Demand of an Inheritance, of a Legacy, a Debt, a Service, and other Rights, were preſcribed in thirty years[f].

[f] Sicut

[h] Sicut in rem ſpeciales, ita de univerſitate, ac perſonales actiones ultra triginta annorum ſpatium minimè protendantur. Sed ſi qua res, vel jus aliquod poſtuletur, vel perſona qualicunque actione vel perſecutione pulſetur, nihilominus erit agenti triginta annorum præſcriptio metuenda. *l. 3. C. de præſcr. 30. vel 40 ann.*

The Action for recovering a Mortgage did not preſcribe but in the ſpace of forty years, when the Thing mortgaged was in the poſſeſſion of the Debtor, or of his Heirs, or even in the hands of a third perſon, if the Debtor was ſtill living. Thus, the Hypothecary Action laſted longer in this caſe, than the bare Perſonal Action. After the death of the Debtor, it laſted only thirty years[i].

[i] Quamobrem jubemus hypothecarum perſecutionem, quæ rerum movetur gratia vel apud debitores conſiſtentium, vel apud debitorum hæredes, non ultrà quadraginta annos, ex quo tempore cœpit, prorogari. *l. 7. §. 1. C. de præſcr. 30. vel 40. ann.*

Ex quo autem in fata ſua debitor deceſſerit, ex eo quaſi ſuo nomine poſſidentem poſteriorem creditorem, meritò poſſe triginta annorum opponere præſcriptionem. *d. l. §. 2.*

All the other ſorts of Preſcriptions of Goods or Rights, of what nature ſoever they were, and as to which it might have been pretended that they ought not to preſcribe in thirty years, were regulated to forty years; even as to Goods and Rights belonging to the Church, and to the Publick[k].

[k] Quidquid præteritarum præſcriptionum vel verbis vel ſenſibus minus continetur, implentes, per hanc in perpetuum valituram legem ſancimus, ut ſi quis contractus, ſi qua ſit actio, quæ cùm non eſſet expreſſim ſupradictis temporalibus præſcriptionibus concepta, quorundam tamen vel fortuita, vel excognita interpretatione ſæpè dictarum exceptionum laqueos evadere poſſe videatur: huic ſaluberrimæ noſtræ ſanctioni ſuccumbat, & quadraginta annorum curriculis proculdubio ſopiatur. Nullumque jus privatum, *vel publicum in quacumque cauſa, vel quacumque perſona*, quod prædictorum quadraginta annorum extinctum eſt jugi ſilentio, moveatur. *l. 4. C. de præſcr. 30. vel 40. ann.* See the ſecond Article of the fifth Section, and the remarks which are there made.

Pro temporalibus autem præſcriptionibus decem & viginti, & triginta annorum, ſacroſanctis Eccleſiis & aliis venerabilibus locis ſolam quadraginta annorum præſcriptionem opponi præcipimus: hoc ipſo ſervando & in exactione legatorum, & hæreditatum, quæ ad pias cauſas relicta ſunt. *Nov. 131. c. 6.*

All theſe different Preſcriptions have been reduced in many of the Provinces of *France*, which have their peculiar Cuſtoms, and even in thoſe Provinces which are governed by the *Roman* Law, to one bare Preſcription of thirty years. And in the others, they obſerve theſe different Preſcriptions of ten, twenty, thirty, forty years. And there are even ſome of them which have made ſome changes therein, and which have received the Preſcription of thirty years, only for Perſonal and Mobilary Actions, and have extended the other Preſcriptions to forty years.

It is not neceſſary to conſider the motives of theſe different Diſpoſitions of the *Roman* Law, nor the reaſons why they are not obſerved in many of the Cuſtoms. Every Uſage hath its views, and conſiders in the oppoſite Uſages their inconveniences. And it ſufficeth to remark here what is common to all theſe different Diſpoſitions of the *Roman* Law, and of the Cuſtoms, as to what concerns the times of Preſcriptions. Which conſiſts in two views; one, to leave to the Owners of Things, and to thoſe who pretend to any Rights, a certain time to recover them: and the other, to give peace and quiet to thoſe whom others would diſturb in their Poſſeſſions, or in their Rights, after the ſaid time is expired.

We muſt take notice here of the difference which the *Roman* Law makes between Preſcription in general, and that kind of it which they diſtinguiſhed by the name of *Uſucapio*. By *Uſucapio*, they meant the manner of acquiring the Property of Things, by the effect of time[m]. And Preſcription had alſo the ſame meaning, but it ſignified moreover the manner of acquiring and loſing all ſorts of Rights, and Actions, by the ſame effect of the time regulated by Law. We make this remark here, only to acquaint the Reader, that theſe two words, *Præſcriptio*, and *Uſucapio*, which we ſhall meet with in ſeveral Laws quoted on this Title, are to be taken in the ſenſe which the word Preſcription ſhall have in the Articles where the ſaid Laws ſhall be quoted. For we ſhall never make uſe of the word *Uſucapio*; that of Preſcription being common by our Uſage, both to the manner of acquiring the Property of Things, and to that of acquiring and loſing all ſorts of Rights, by the effect of time.

[m] *V. l. un. C. de uſucap. tranſf. inſt. de uſucap.*

Beſides theſe ſeveral ſorts of Preſcriptions of the *Roman* Law which have been juſt now mentioned, there are in *France* other ſorts of Preſcriptions eſtabliſhed by the Ordinances, and by ſome Cuſtoms which have regulated the time, which may be here added to the other ſorts of Preſcriptions which have been mentioned.

The

The Power of Redemption belonging to the Kindred of a Family.

The Action which the Kindred of a Family have for redeeming Lands that are ſold out of the Family to Strangers, which is eſtabliſhed in general throughout the whole Kingdom, by an Ordinance of the month of *November*, 1581, and in particular, by ſeveral Cuſtoms, preſcribes in the ſpace of one year, according to the ſaid Ordinance, and the Cuſtoms.

Reſciſions.

Reſciſions and Reſtitutions of things to their former ſtate, preſcribe in ten years, purſuant to the Ordinance of 1510. art. 46. and that of 1535. c. 8. art. 30. as ſhall be obſerved in the Preamble to the firſt Section of the Title of Reſciſions.

Servants Wages.

Actions for the Wages of Servants, preſcribe in one year, according to the Ordinance of 1510. art. 67. And ſome Cuſtoms have alſo fixed to one year, the Fees or Demands of Phyſicians, Apothecaries and Surgeons.

Merchants Accounts, and Tradeſmens Bills.

The Accounts of Merchants who ſell by Retail, and Tradeſmens Bills, preſcribe in ſix months time, according to the Ordinance of 1539. art. 19.

Peremption of Inſtance.

The Actions which one ceaſes to proſecute for three years together without any proceedings in the Cauſe, are loſt by a Preſcription which is called Peremption, which has this effect, that the Inſtance is annulled, and has not ſo much as the effect to interrupt the Preſcription. And if the Demand were not already extinguiſhed by Preſcription, and that the Plaintiff had a mind to proſecute it, he would be obliged to begin a new Inſtance, according to the Ordinance of 1563. art. 15. This Peremption has ſome relation to what *Juſtinian* had ordained, that Inſtances ſhould not laſt longer than three years[n]. Which it is not our buſineſs to explain in this place; for beſides that this Regulation does not agree with our Uſage, this matter does not come within the deſign of this Book.

[n] *V. l.* 13. *C. de judic.*

[*Preſcription, in the common acceptation which it hath in the Law of* England, *is ſuch a portion of Time, as exceeds the memory of Man. For whoſoever will preſcribe againſt another an Annuity, or the Cognizance of any Plea in his Court, or any Service in his Fee, or other Rights of the like kind, he muſt prove them to have been time out of mind. Nor do we mean any other than this, when we ſpeak generally of Preſcription.* Coke 1 Inſt. fol. 113, 114. Covel's Inſtit. lib. 2. tit. 6. Bracton de legibus & conſuet. Angliæ. lib. 2. cap. 22.

But there are in England, *Preſcriptions of ſhorter time. For by* Stat. 32. H. VIII. cap. 2. *it is enacted, That no perſon ſhall have or maintain any Writ of Right, or make any Preſcription, Title or Claim, to any Manors, Lands, Tenements, or other Hereditaments, of the poſſeſſion of his Anceſtor or Predeceſſor, and declare and alledge any further ſeiſin or poſſeſſion of his Anceſtor or Predeceſſor, than within threeſcore years next before the date of the ſaid Writ, or commencement of the ſaid Action or Claim. And by the ſame Statute, all Actions Poſſeſſory are limited to the ſpace of fifty years.*

And by Stat. 21. Ja. 1. cap. 16. *it is enacted, That all Writs of* Formedon in Deſcender, Formedon in Remainder, *and* Formedon in Reverter, *ſhall be ſued and taken within twenty years next after the title and cauſe of Action firſt deſcended and fallen, and at no time after the ſaid twenty years. And it is thereby further enacted, that all Actions of Treſpaſs,* Quare clauſum fregit, Detinue, *Action* ſur Trover *and Replevin for taking away of Goods and Cattle, all Actions of Accompt, and upon the Caſe, other than ſuch Accompts as concern the Trade of Merchandize between Merchant and Merchant, their Factors or Servants, all Actions of Debt grounded upon any lending or Contract, without Specialty, ſhall be brought within ſix years next after the cauſe of ſuch Action or Suit; except the Action upon the caſe for Slander, which is to be brought within two years next after the words ſpoken, and not after. Actions of Treſpaſs, of Aſſault, Battery, Wounding, and Impriſonment, are to be commenced within four years next after the cauſe of ſuch Actions or Suit.*]

The CONTENTS.

1. *Definition of Preſcription.*
2. *The motive of Preſcription, and its effect.*
3. *When it is acquired.*
4. *The Poſſeſſor joins to his poſſeſſion that of his Author.*
5. *A caſe where the poſſeſſion of another than the Author avails the poſſeſſor.*
6. *Poſſeſſions interrupted.*
7. *Intervals without any apparent poſſeſſion.*
8. *Interval without a poſſeſſor, which does not interrupt the Preſcription.*
9. *What things may be preſcribed.*
10. *Rights and Actions preſcribe.*
11. *A caſe where one preſcribes things that are out of commerce.*
12. *Services preſcribe.*
13. *A ſincere belief of one's Right, neceſſary for preſcribing.*
14. *Preſcription without a Title.*
15. *If the Poſſeſſor has loſt his Title.*
16. *Of him who purchaſes fairly and honeſtly of an unjuſt poſſeſſor.*
17. *Difference between a good and a bad conſcience in one and the ſame caſe.*
18. *The Heir or Executor is anſwerable for the knavery of the deceaſed.*
19. *But not the Legatee, or Donee.*
20. *Preſcription of the Arrears of Rents, and of other annual Duties.*
21. *Preſcription may be acquired, altho' we have not the poſſeſſion in our own hands.*

I.

1. *Definition of Preſcription.*

PReſcription is a manner of acquiring and loſing the Right of Property in a Thing, and of all other Rights, by the

the effect of Time. Thus a fair and honeſt Poſſeſſor acquires the Property of an Eſtate by a peaceable poſſeſſion during the time regulated by Law; and the ancient Proprietor is ſtript thereof, for having ceaſed to poſſeſs it, or to demand it, during the ſaid time. Thus a Creditor loſes his debt, for having omitted to demand it within the time limited for Preſcription, and the Debtor is diſcharged from it by the long ſilence of his Creditor. Thus other Rights are acquired by a long Enjoyment, and are loſt for want of exerciſing them [a].

[a] Uſucapio eſt adjectio dominii, per continuationem poſſeſſionis temporis Lege definiti. *l.* 3. *ff. de uſurp. & uſuc.* See the ninth Article.

Longi temporis præſcriptio his qui bonâ fide acceptam poſſeſſionem, & continuatam: nec interruptam inquietudine litis tenuerunt, ſolet patrocinari. *l.* 2. *C. de præſcr. longi temp.*

II.

2. The motive of Preſcription, and its effect.

Seeing Preſcriptions have been eſtabliſhed for the Publick Good, that the Property of Things and other Rights may not be always in an uncertainty, he who has acquired the Preſcription has no need of a Title; the Preſcription being to him inſtead of a Title [b].

[b] Bono publico uſucapio introducta eſt, ne ſcilicet quarumdam rerum diù & ferè ſemper incerta dominia eſſent. *l.* 1. *ff. de uſurp. & uſuc.*

This Article is to be underſtood only of Preſcription: which may be acquired without a Title, and not of the Preſcription of ten and twenty years, of which mention has been made in the Preamble, and which ſuppoſes a Title.

III.

3. When it is acquired.

Preſcription being founded on the duration of the Poſſeſſion during the time regulated by Law, it is acquired only after the ſaid time is elapſed [c].

[c] In uſucapionibus non à momento ad momentum, ſed totum poſtremum diem computamus. Ideòque qui horâ ſextâ diei Kalendarum Januariarum poſſidere cœpit, horâ ſextâ noctis pridie Kalendas Januarias, implet uſucapionem. *l.* 6. *&* *l.* 7. *de uſurp. & uſuc.* In uſucapione ità ſervatur, ut etiamſi minimo momento noviſſimi diei poſſeſſa ſit res, nihilominùs repleatur uſucapio: nec totus dies exigitur ad expiendum conſtitutum tempus. *l.* 15. *ff. de div. temp. præſcr.*

We have conceived this Rule in theſe general terms, after the time of the Preſcription is elapſed, becauſe in whatever ſenſe we underſtand this time, whether it be that we will have the Preſcription to end at the beginning of the laſt day, or only the laſt moment of the laſt day, it holds ſtill true, that the time neceſſary to preſcribe muſt be elapſed. Which we have done to avoid ſaying that the Preſcription is acquired only at the laſt moment of the time regulated for preſcribing; becauſe this expreſſion would be contrary to the texts cited on this Article. But according to our Uſage, Preſcription is acquired only at the laſt moment of the laſt day. And a demand made on the laſt day would interrupt the Preſcription. For altho' the effect of Preſcription be favourable, when it is once acquired; yet this favour is not extended ſo far as to ſhorten the time that is neceſſary for ſtripping Proprietors of their Right. And that which can hinder the Preſcription before it be acquired, ought to be favourably received, for reſiſting the Owner in his Right. Thus it is juſt to receive a demand for interrupting the Preſcription, provided the laſt moment be not yet expired, according to the Rule which was obſerved in the Roman *Law, for thoſe kinds of Actions which were called Temporal, in which Preſcription had not its effect till after the laſt moment was expired.* In omnibus temporalibus actionibus niſi noviſſimus totus dies compleatur, non finit obligationem. *l.* 6. *ff. de obl. & action. Which was alſo obſerved, as we likewiſe do, in computing the time of Minority, which in* France *ends only at the laſt moment of the age of twenty five years, as ſhall be ſhewn in the twentieth Article of the ſecond Section of the Reſciſion of Contracts. And in fine, wherever ten, or twenty, or thirty years are neceſſary for a Preſcription, the years ought to be underſtood according to the ordinary computation, which comprehends all the moments of all the days neceſſary to make up the year. And this computation is particularly juſt in the Preſcriptions which one Law terms odious.* l. ult. Cod. de ann. excep. v. l. 2. ff. de diverſ. temp. præſcrip. *To which we may add, that the texts cited upon this Article do not ſpeak of all ſorts of Preſcriptions indifferently, but only of that particular kind of Preſcription which the* Romans *called* Uſucapio, *and therefore they ought not to be extended to the other kinds of Preſcriptions, which we do not diſtinguiſh from* Uſucapio. See the difference between Preſcription in general, and that kind of it called *Uſucapio*, at the end of the Preamble to this Section.

IV.

4. The Poſſeſſor joins to his poſſeſſion that of his Author.

If a Poſſeſſor chances to die before he has acquired the Preſcription, and his Heir continues in poſſeſſion, we join together the time of the poſſeſſion of the one and the other, and the Preſcription is acquired to the Heir after the poſſeſſion of his Author and his own joined together have laſted the time regulated for preſcribing. And the ſame thing holds in the poſſeſſion of the Buyer joined to that of the Seller to whom he ſucceeds, and in the poſſeſſion of the Donee and Donor, of the Legatee and Teſtator, and in the ſame manner of all thoſe who poſſeſs ſucceſſively, having right the one from the other [d].

[d] Planè tribuuntur (acceſſiones poſſeſſionum) his qui in locum aliorum ſuccedunt. Sive ex contractu, ſive voluntate. Hæredibus enim, & his qui ſucceſſorum loco habentur, datur acceſſio teſtatoris. *l.* 14. §. 1 *ff. de div. tem. præſcr.* Emptori tempus venditoris ad uſucapionem procedit. *l.* 2. §. 20. *ff. pro emptore. l.* 76. §. 1. *ff. de contr. empt.* Legatario dandam acceſſionem ejus temporis quo fuit apud teſtatorem, ſciendum eſt. *l.* 13. §. 10. *ff. de acq. vel amit. poſſ.* Sed & is cui res donata eſt acceſſione utetur ex perſona ejus qui donavit. *l.* 13. §. 11. *ff. eod. l.* 11. *C. de præſc. long. temp.*

V.

5. A caſe where the poſſeſſion of another than the Author.

Poſſeſſion is not only continued between two poſſeſſors, one of whom derives his right from the other; but it may happen that a poſſeſſor may acquire the

avails the poſſeſſor.

the Preſcription, by joining to his poſſeſſion that of another perſon from whom he does not derive his right. Thus, for example, if an Heir poſſeſſes during ſome time a Thing bequeathed to another perſon before it is delivered to the Legatee, whether it be that they wait for the event of the condition of the Legacy, or that it is occaſioned barely thro' delay, the time of that Poſſeſſion will ſerve to acquire the Preſcription to the ſaid Legatee, altho' he does not derive his right from the Heir[e]. For the poſſeſſion of the Teſtamentary Heir, who repreſents the Teſtator, is conſidered, as if it were the Teſtator himſelf who had poſſeſſed. Thus in the like caſes, it is by Equity, according to the circumſtances, that we are to judge if the Poſſeſſions of ſeveral perſons may be joined[f].

[e] An hæredis poſſeſſio accedat (legatario) videamus, & puto ſive purè, ſive ſub conditione fuerit relictum, dicendum eſſe, id temporis quo hæres poſſedit, ante exiſtentem conditionem, vel reſtitutionem rei, legatario proficere. *l.* 13. §. 10. *ff. de acq. vel amitt. poſſ.*

[f] De acceſſionibus poſſeſſionum nihil in perpetuum, neque generaliter definire poſſumus: conſiſtunt enim in ſola æquitate. *l.* 14. *ff. de diverſ. temp. præſcr.*

VI.

6. Poſſeſſions interrupted.

The poſſeſſions of divers poſſeſſors who ſucceed the one to the other, are joined only in the caſes where they follow one another without interruption. But if there be any interval of another poſſeſſion of a third perſon who has interrupted thoſe poſſeſſions, the poſſeſſions which had preceded the ſaid interruption would be uſeleſs to the laſt poſſeſſor. For Preſcription is acquired only by a continued poſſeſſion, which one enjoys peaceably during all the time regulated for preſcribing[g].

[g] Acceſſio poſſeſſionis fit non ſolùm temporis quod apud eum fuit, unde is emit; ſed & qui ei vendidit, unde tu emiſti. Sed ſi medius aliquis de auctoribus non poſſederit, præcedentium auctorum poſſeſſio non proderit: quia conjuncta non eſt. *l.* 15. §. 1. *ff. de div. temp. præſcr.* Poſſeſſio teſtatoris ita hæredi procedit, ſi medio tempore à nullo poſſeſſa eſt. *l.* 20. *ff. de uſurp. & uſuc.*

But if this interruption had been cauſed only by ſome Uſurpation, or by a trouble given without any juſt ground, as if a third perſon had recovered the thing at Law from one of the poſſeſſors under a falſe Title, and by a Sentence which was afterwards reverſed upon an Appeal; this trouble having ceaſed, would it not be juſt not only to join together the poſſeſſions, but even to add to them the time of the ſaid trouble? Since it would be true, that the former trouble not having proceeded from him who ſhould acceſſion the new interruption, it would be altogether uſeleſs to him: and that the poſſeſſor would have retained his right during an interruption which would be found to have been only an unjuſt trouble, and which would not have hindred him from remaining Maſter, with an intention to poſſeſs, which had the ſame effect as Poſſeſſion, and rendered his condition like to that of a poſſeſſor thruſt out of poſſeſſion by force, who is nevertheleſs conſidered as poſſeſſor. Si quis vi de poſſeſſione dejectus ſit, perinde haberi debet ac ſi poſſideret: cùm interdicto de vi recuperandæ poſſeſſionis facultatem habeat. *l.* 17. *ff. de acq. vel amitt. poſſ.* See the twenty fourth Article of the ſecond Section.

VII.

7. Intervals without any apparent poſſeſſion.

The intervals in which the poſſeſſor ceaſes to exerciſe his poſſeſſion, do not interrupt it, and do not hinder him from continuing his Preſcription. Thus, when a poſſeſſor being either abſent, or negligent, ceaſes for ſome years to go upon his Eſtate and to cultivate it; he retains nevertheleſs his poſſeſſion. And he joins not only the times of his actual exerciſe of his Poſſeſſion, but he adds to them likewiſe the interval wherein he ceaſed to exerciſe it[h].

[h] Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poteſt. Si ergo prædiorum deſertam poſſeſſionem, non derelinquendi affectione, tranſacto tempore non coluiſti: ſed metus neceſſitate culturam eorum diſtuliſti, præjudicium tibi ex tranſmiſſi temporis injuria, generari non poteſt. *l.* 4. *C. de acq. & ret. poſſ.* See the twenty fourth Article of the ſecond Section.

VIII.

8. Interval without a poſſeſſor, which does not interrupt the Preſcription.

It may happen that there may be an interval without a poſſeſſor, which does not interrupt the Preſcription. Thus when an Executor, who was either abſent, or was ignorant of his Right, does not take poſſeſſion of the Eſtate till ſome time after the Succeſſion has been open, he will nevertheleſs join to his poſſeſſion that of the deceaſed, and even the time of the Interval between the falling of the Inheritance, and his entring to the poſſeſſion of it. For the Goods are preſerved to the future Heir or Executor, and are as it were poſſeſſed by the Inheritance it ſelf, which holds the place of Maſter[i].

[i] Hæreditas dominæ locum obtinet: & rectè dicetur, hæredi quoque competere (interdictum) & cæteris ſucceſſoribus, ſive antequam ſucceſſerit, ſive poſtea aliquid ſit vi aut clam admiſſum. *l.* 13. §. 5. *in f. ff. quod vi aut clam.*

Vacuum tempus quod ante aditam hæreditatem, vel poſt aditam interceſſit, ad uſucapionem hæredi procedit. *l.* 31. §. 5. *ff. de uſurp. & uſuc.*

This Article may be applied likewiſe to the Heir at Law, or next of kin, who ſucceeds to one dying Inteſtate, although by our Uſage he be ſeized and poſſeſſed of the Eſtate by the death of him to whom he ſucceeds. For if he is ignorant of his Right, he does not poſſeſs the Goods although he be Maſter of them.

IX.

9. What things may be preſcribed.

We may acquire by Preſcription all things which are in Commerce, and of which we may have the property[l], if the

the Law makes no exception thereto, as will appear in the fifth Section.

[l] *This is a conſequence of the Rules explained in the two firſt Articles.*

X.

10. *Rights and Actions preſcribe.*

The uſe of Preſcription is not only to acquire the Property to thoſe who have preſcribed by Poſſeſſion, and to diveſt the proprietors of it, who have ſuffered others to preſcribe; but there is yet another uſe of Preſcriptions, in which poſſeſſion is not neceſſary, which is that of annulling the Rights and Actions which one has ceaſed to exerciſe during a time ſufficient for preſcribing. Thus a Creditor loſes his debt, and all Rights and Actions are loſt, although thoſe who are Debtors of them poſſeſs nothing, if a demand is not made of the debt, or if one ceaſes to exerciſe his right during the time regulated by Law [m].

[m] Sicut in rem ſpeciales ita de univerſitate, ac perſonales actiones ultra triginta annorum ſpatium minimè protendantur. Sed ſi qua res, vel jus aliquod poſtuletur, vel perſona qualicumque actione vel perſecutione pulſetur, nihilominus erit agenti triginta annorum præſcriptio metuenda. *l.* 3. *C. de præſc.* 30. *vel* 40. *an.*

XI.

11. *A caſe where one preſcribes things that are out of commerce.*

One may acquire or loſe by Preſcription certain Things which are out of Commerce. And they are acquired by their connexion with others of which one may have the Property. Thus, he who acquires an Eſtate to which is annexed a Right of Patronage, or of which the Mannor-Houſe has a Chapel in it for the uſe of the Maſter, may preſcribe this Right of Patronage, and the uſe of the Chapel [n].

[n] Quædam quæ non poſſunt ſola alienari, per univerſitatem tranſeunt: ut fundus dotalis ad hæredem, & res cujus aliquis commercium non habet. Nam etſi ei legari non poſſit, tamen hæres inſtitutus dominus ejus efficitur. *l.* 62. *ff. de acq. rer. dom.*

Although this Text have no preciſe relation to the Rights mentioned in this Article, yet it may be applied to them.

XII.

12. *Services preſcribe.*

Services are acquired, and are loſt by Preſcription [o].

[o] *See the eleventh Article of the firſt Section of Services, with the Remark made upon it; and the fifth and following Articles of the ſixth Section of the ſame Title.*

XIII.

13. *A ſincere belief of one's Right, neceſſary for preſcribing.*

To acquire Preſcription, it is neceſſary to have poſſeſſed honeſtly and fairly, that is, that the poſſeſſor muſt have been perſuaded that he had a juſt cauſe of Poſſeſſion, and muſt have been ignorant that what he poſſeſſed did belong to another perſon. And this integrity is always preſumed in every poſſeſſor, if it is not proved that he has poſſeſſed with a bad conſcience, knowing the thing to be another's [p]. But altho' an upright and ſincere belief of one's Right be a juſt cauſe which gives a Right to preſcribe, yet it is not always ſufficient of itſelf, and it is neceſſary over and above that the Preſcription be not obſtructed by any one of the cauſes which ſhall be explained in the following Section [q].

[p] Bonæ fidei emptor eſſe videtur qui ignoravit eam rem alienam eſſe, aut putavit eum qui vendidit, jus vendendi habere, puta procuratorem, aut tutorem. *l.* 109. *ff. de verb. ſign.*

Non procedit ejus uſucapio qui non bonâ fide videatur poſſidere. *l.* 32. §. 1. *ff. de uſurp. & uſuc.*

His uſucapio non competit, qui malâ fide poſſident. §. 3. *inſt. de uſuc. & long. temp. præſcr.* See the firſt Article of the fourth Section of the Title of Proofs.

[q] Ubi lex inhibet uſucapionem, bona fides poſſidenti nihil prodeſt. *l.* 24. *ff. de uſurp. & uſuc.*

XIV.

14. *Preſcription without a Title.*

Seeing Poſſeſſion joined with a ſincere belief of one's own Right, is ſufficient for preſcribing Things which are capable of Preſcription, and that it holds the place of a Title, altho' one have not any other; the poſſeſſor who has preſcribed, whether he be ignorant of the origin and cauſe of his Poſſeſſion, or that having had a Title, he is not able to juſtify it, will be maintained againſt the ancient proprietor who ſhews a Title. In the ſame manner as a Debtor who has preſcribed the debt, has no need of an Acquittance to be diſcharged from the demand of his Creditor. For Preſcription annuls the Titles of the Proprietors and Creditors. And they ought to blame themſelves for having neglected their Rights for ſo long a time [r].

[r] Bono publico uſucapio introducta eſt, ne ſcilicet quarumdam rerum diù & ferè ſemper incerta dominia eſſent. Cùm ſufficeret dominis ad inquirendas res ſuas, ſtatuti temporis ſpatium. *l.* 1. *ff. de uſur. & uſucap.*

In rem ſpeciales actiones ultra triginta annorum ſpatium minimè protendantur. *l.* 3. *C. de præſc.* 30. *vel* 40. *ann.* See the ninth Article.

It is neceſſary to take notice here, that what is ſaid in this Article, of its not being neceſſary for preſcribing to have a Title, ought to be ſo underſtood as not to confound the Law of thoſe Provinces in France, *where there is only one Preſcription of thirty years, which demands no Title, with that obſerved in other Provinces, where they diſtinguiſh, according to the* Roman *Law, this Preſcription of thirty years, from that of ten, and twenty years, which preſuppoſes a Title, as has been remarked in the Preamble to this Section.*

It is likewiſe to be obſerved, that we have not comprehended in this Article the caſe where the poſſeſſor never had a Title; becauſe we cannot ſuppoſe an honeſt upright Poſſeſſion which has not proceeded from ſome Title or other; that is to ſay, which has not had ſome juſt foundation in its beginning, and ſome lawful cauſe which gave him Right to poſſeſs, altho' there remain no Deed, or other Proof thereof; for otherwiſe the Poſſeſſion would be knaviſh and diſhoneſt. And even he who ſhould put himſelf in poſſeſſion of an Eſtate that is vacant, ſuch as any Land that is part of an Inheritance which is abandoned, or any Tenement belonging to one who has been abſent for a long time, would be a diſhoneſt poſſeſſor, ſeeing he could not but know that he had uſurped what another ought to have. Fundi alieni poteſt aliquis ſine vi nanciſci poſſeſſionem, quæ vel ex negligentia domini vacet, vel quia dominus ſine ſucceſſore deceſſerit, vel longo tempore abfuerit. Quam rem ipſe quidem non poteſt uſurpare, quia intelligit alienum ſe poſſidere, & ob id mala fide poſſidet. *l.* 37. §. 1. *&* *l.* 38. *ff. de uſurp. & uſuc.* Ridiculum etenim eſt dicere, vel audire, quod per ignorantiam alienam rem aliquis quaſi propriam occupaverit. *l. ult. Cod. unde vi.*

But although ſuch a Poſſeſſor be in the ſame condition with an Uſurper, ſancimus talem poſſeſſorem (qui vacuam poſſeſſionem abſentium, ſine judiciali ſententia detinuit) ut prædonem intelligi. *d. l. ult. C. unde vi. If nevertheleſs he has poſſeſſed for the ſpace of thirty years, which acquires a Preſcription without a Title, the ſame Law, and the eighth Law,* §. 1. C. de præſcr. 30. vel 40. annor. *and likewiſe the firſt Law,* §. 1. C. de ann. except. *will have him not to be troubled any more after ſo long a time, notwithſtanding he knew that he had no right to what he poſſeſſed. The meaning of which is not, as if theſe Laws juſtified this poſſeſſor in point of Conſcience; but only that the Civil Policy does not permit that poſſeſſors be moleſted after a long Poſſeſſion, or that they be obliged to make good their Titles, or even to declare the origine of their Poſſeſſion. For the pretext of enquiring after unjuſt poſſeſſors, would diſturb the peace and quiet of juſt and lawful poſſeſſors. But as to the point of Conſcience, it is moſt certain, that the length of time does not ſecure unjuſt poſſeſſors from the guilt of ſin, and that on the contrary their long poſſeſſion is only a continuation of their injuſtice. And therefore it is that the Canon Law does not allow that an unjuſt Poſſeſſor can ever preſcribe, how long ſoever his poſſeſſion may have been.* Poſſeſſor malæ fidei ullo tempore non præſcribit. *Reg.* 2. *de reg. jur. in* 6.

Quoniam omne quod non eſt ex fide peccatum eſt, Synodali judicio definimus, ut nulla valeat abſque bona fide præſcriptio tam canonica, quàm civilis. Cùm generaliter ſit omni conſtitutioni, atque conſuetudini derogandum, quæ abſque mortali peccato non poteſt obſervari. Unde oportet, ut qui præſcribit, in nulla temporis parte rei habeat conſcientiam alienæ. *C. ult. extrà de præſcript.*

And it is likewiſe our Uſage, that although the poſſeſſor who has preſcribed be not obliged to prove his Title, nor to declare the origine of his Poſſeſſion, yet nevertheleſs if it is diſcovered, and it be found to be knaviſh, the Poſſeſſion will be uſeleſs, againſt the Maſter, who ſhall prove his Right. Thus a Depoſitary who in that quality had poſſeſſed a Thing for upwards of thirty years, would not have acquired the Preſcription. See the eleventh Article of the fifth Section.

XV.

In the places, and in the caſes, where Preſcription preſuppoſes a Title to be proved, if he who has preſcribed has loſt his, he ſhall nevertheleſs be maintained in his poſſeſſion; provided he has proofs of the truth of the Title which is loſt[r]. *15. If the Poſſeſſor has loſt his Title.*

[r] Longi temporis poſſeſſione munitis, inſtrumentorum amiſſio nihil juris aufert. Nec diuturnitate poſſeſſionis partam ſecuritatem, maleficium alterius turbare poteſt. *l.* 7. *C. de præſcr. long. temp.*

We muſt apply the uſe of this Article to the Provinces which obſerve the Preſcription of ten and twenty years, according to the Roman *Law.* See the Preamble to this Section. See the eleventh Article of the ſecond Section of Proofs.

XVI.

The integrity that is neceſſary for acquiring Preſcription is conſidered only in the perſon of him who has poſſeſſed, and the knavery of his Author ought not to harm him. Thus, he who believes that the Seller of whom he buys a thing is Maſter of what he ſells him, does nevetheleſs preſcribe although the Seller were an Uſurper[s]. *16. Of him who purchaſes fairly and honeſtly of an unjuſt Poſſeſſor.*

[s] Si (malæ fidei poſſeſſor) alii bonâ fide accipienti tradiderit, poterit ei longâ poſſeſſione res acquiri. §. 7. *inſt. de uſucap.* De auctoris dolo exceptio emptori non objicitur. *l.* 4. §. 27. *ff. de dol. mal. & met. exc.* See the third Article of the third Section, and the eighteenth and nineteenth of this Section.

XVII.

It may happen by a conſequence of the Rule explained in the foregoing Article, that in the caſe of two Poſſeſſors of two parts of an Eſtate that was uſurped, the one may be maintained by Preſcription, and the Poſſeſſion during the ſame time be uſeleſs to the other. Thus, for example, if an unjuſt Poſſeſſor ſells one half of an Eſtate which he has uſurped, reſerving to himſelf the other half, and the Purchaſer of the half that is ſold having poſſeſſed it with a good conſcience during the time of Preſcription, and the Seller having likewiſe poſſeſſed the other half during the ſame time, the Proprietor demands to be reſtored to his Eſtate, and brings his Action againſt both the Poſſeſſors; the Purchaſer of the half that was ſold will be maintained in his Poſſeſſion, by the effect of his good conſcience: and the Proprietor will be able to recover only *17. Difference between a good and a bad conſcience in one and the ſame caſe.*

the other half from the Uſurper, whoſe bad conſcience, or knowledge of his poſſeſſing another man's Eſtate will have hindred the Preſcription[u].

[u] Si partem poſſeſſionis matæ fidei poſſeſſor vendidit: id quidem quod ab ipſo tenetur, omnino cum fructibus recipi poteſt. Portio autem quæ diſtracta eſt ita demum rectè petitur à poſſidente, ſi ſciens aliena comparavit, vel bonâ fide emptor nondum implevit uſucapionem. *l. 5. C. de uſuc. pro emp.* See the ninth and tenth Articles of the fifth Section.

XVIII.

18. *The Heir or Executor is anſwerable for the knavery of the deceaſed.*

We muſt not comprehend under the Rule explained in the ſixteenth Article, the Heir or Executor who enters with a good conſcience on the Poſſeſſion of the Goods of the Inheritance. For as he is univerſal Succeſſor, who inherits all the Rights of the deceaſed, and who obliges himſelf to all the Charges the deceaſed was liable to, ſo he is likewiſe anſwerable for all his deeds. Thus, although the Heir or Executor were ignorant of the vice of the Poſſeſſion of the deceaſed who had poſſeſſed with a bad conſcience, yet he could not preſcribe what the deceaſed had uſurped[x].

[x] Cùm hæres in jus omne defuncti ſuccedit ignoratione ſua defuncti vitia non excludit. *l. 11. ff. de diverſ. temp. præſcr.* Uſucapere (hæres) non poterit, quod defunctus non potuit. Idem juris eſt cùm de longa poſſeſſione quæritur. Neque enim rectè defendetur; cùm exordium ei bonæ fidei ratio non tueatur. *d. l. V. l. 4. §. 15. ff. de uſurp. & uſuc. l. ult C. com. de uſuc.* Vitia poſſeſſionum à majoribus contracta perdurant, & ſucceſſorem auctoris ſui culpa comitatur. *l. 11. C. de acq. & ret. poſſ.*

But if the Heir or Executor of him who had acquired with a good conſcience, knows that the Thing belonged to another perſon, will not his knowledge of the other's right to the Thing which he poſſeſſes, if the ſame is well proved, hinder him from preſcribing? It is ſaid in ſome Laws, that if the deceaſed has made the purchaſe with a good conſcience, his Heir ſhall preſcribe, although he knows that the Thing belonged to another, and not to the Seller. Si defunctus bonâ fide emerit, uſucapietur res, quamvis hæres ſcit alienam eſſe. l. 2. §. 19. ff. pro emptore. l. un. C. de uſuc. transf. *And another Law makes this diſtinction in the matter; that if the deceaſed had not begun to poſſeſs, and that the delivery of what the deceaſed had bought was only made to his Heir, who knows that the Thing did not belong to the Seller, the Heir ſhall not preſcribe, becauſe the good conſcience is conſidered in the beginning of the Preſcription. But if the delivery had been made to the deceaſed, and he had poſſeſſed with a good conſcience, this Poſſeſſion being continued in the perſon of the Heir, will acquire to him the Preſcription, altho' he know that the Thing was not the Seller's.* Hæres ejus qui bonâ fide rem emit, uſu non capiet ſciens alienam, ſi modò ipſi poſſeſſio tradita ſit: continuatione verò non impedietur hæredis ſcientia. l. 43. ff. de uſurp. & uſuc. *One may judge by the Remark which has been made on the fourteenth Article, that if it were well proved that this Heir knew what he poſſeſſed to be another's, the good conſcience of the deceaſed ought not to juſtify his Poſſeſſion.*

XIX.

19. *But not the Legatee, or Donee.*

Legatees, and Donees are not anſwerable, as the Heir or Executor is, for the deed of the Teſtators, and Donors; becauſe they do not ſucceed to all their Goods and to all their Rights, and ſo are not bound for all their Charges. And if they have received with a good conſcience what has been bequeathed or given to them, although the Teſtator, or Donor had poſſeſſed the thing knaviſhly and with a bad conſcience, knowing it to be another's, yet that will not hinder them from preſcribing, if they poſſeſs it peaceably during the time regulated by Law[y].

[y] An vitium auctoris, vel donatoris, ejuſve qui mihi rem legavit mihi noceat; ſi fortè auctor meus juſtum initium poſſidendi non habuit, videndum eſt. Et puto neque nocere, neque prodeſſe. Nam denique & uſucapere poſſum, quod auctor meus uſucapere non potuit. *l. 5. ff. de diverſ. temp. præſcr.* See the ſeventeenth Article.

This Article is not to be underſtood of thoſe who are univerſal Donees and Legatees, to whom the whole Eſtate of the deceaſed, or a certain Quota of it is given or bequeathed, and who hold the place of Heirs or Executors; but of particular Donees and Legatees, to whom a certain particular Thing is given or bequeathed.

Although particular Legatees and Donees, to whom a certain Thing is given or bequeathed, be not accountable in the ſame manner as the Heir or Executor, for the deed of the Teſtator and Donor; yet nevertheleſs, ſeeing they acquire by a lucrative Title, which diſtinguiſhes their condition from that of a Buyer, or other who acquires for a valuable conſideration, it may be doubted, whether the Rule explained in this Article may give them as great ſecurity in point of Conſcience, as it does in their Poſſeſſion. And if we ſuppoſe, for inſtance, that he who had wrongfully ſeized on an Eſtate belonging to a poor man, had bequeathed it, or given it away to a rich perſon, who after having acquired the Preſcription, being ignorant of the vice in the acquiſition made by his Author, comes to diſcover the Uſurpation: could this Legatee, or Donee, in conſcience make uſe of the Right which the Law gives him to retain this Eſtate, which to him would be ſuperfluous, and which would be ſo neceſſary to thoſe whom his Benefactor had unjuſtly deprived of it? We put the queſtion in theſe circumſtances; for if we ſuppoſe on the other hand, that the Legatee, or Donee was a poor man, and thoſe to whom the Eſtate was to return were perſons at their eaſe, the integrity of the Legatee, or Donee, who knew nothing of the other's Right till after his Preſcription, would ſeem to be a juſt cauſe why he might lawfully take advantage of the Right which the Law gives indifferently to all Legatees.

Seeing this Queſtion is a matter of Conſcience, and for that reaſon does not come within the deſign of this Book, we ſhall not inſiſt any longer on it: and ſhall only remark, that the Queſtions of this nature, where the buſineſs is to examine in one's own conſcience the uſe which a poſſeſſor may make of the Preſcription which he has acquired, in the caſes where ſome duty may raiſe a ſcruple, whether it be lawful to make uſe of it, ought to be decided by the Spirit of the ſecond Law, and by the uſe which it allows to be made of the Law of Preſcriptions. For this Law having been enacted only for the Publick Good, upon the Motives already explained, it does not enter into the ſecret of the Duties of Conſcience which may render the uſe of Preſcription unlawful. And in

that every one ought to take for his Rule the Spirit of the ſecond Law, on which depends the good uſe of all the others.

XX.

20. *Preſcription of the Arrears of Rents, and of other annual Duties.*

The Debtor of a Rent, or of a Penſion, or of other things which are paid yearly, may preſcribe the Rent or Penſion of each year, if it is not demanded within the time regulated by the Law, to reckon from the day that it fell due, even altho' the Principal debt could not be preſcribed. Thus, thoſe who owe Rights which are not liable to Preſcription, ſuch as Quit-Rents in ſome Provinces, may preſcribe the Arrears of ſuch Rights, if they are not demanded within the time that the Preſcription of them takes place; and the Arrears of each year are preſcribed within the time appointed for Preſcription, to be computed from the moment that the Arrears of that year fell due[z].

[z] In his etiam promiſſionibus, vel legatis, vel aliis obligationibus quæ dationem per ſingulos annos, vel menſes, aut aliquod ſingulare tempus continent, tempora memoratarum præſcriptionum, non ab exordio talis obligationis; ſed ab initio cujuſque anni, vel menſis, vel alterius ſingularis, computari, manifeſtum eſt, nulla ſcilicet danda licentia vel ei qui jure emphyteutico rem aliquam per quadraginta vel quoſcumque alios annos detinuerit, dicendi ex tranſacto tempore dominium ſibi in iiſdem rebus quæſitum eſſe, cùm in eodem ſtatu ſemper manere datas jure emphyteutico res oporteat. *l.* 7. §. *ult. de præſcr.* 30. *vel* 40. *ann.*

According to the Ordinance of 1510. *Art.* 71. *the Arrears of Annuities cannot be demanded but within the ſpace of five years after they fall due; which is not to be extended to Ground Rents. And in ſome of the Cuſtoms in* France *the Arrears of Quit Rents are preſcribed in a ſhorter time.*

XXI.

21. *Preſcription may be acquired, although we have not poſſeſſion in our own hands.*

Seeing Preſcription is acquired by Poſſeſſion, and that we may poſſeſs by other perſons, we may therefore preſcribe not only by having the poſſeſſion in our own hands, but alſo by others who poſſeſs for us; as by a Farmer, a Tenant, a Depoſitary, an Uſufructuary, a Tutor, a Guardian, a Factor, or Agent[a].

[a] *See the eighth and ninth Articles of the firſt Section.*

SECT. V.

Of the cauſes which hinder Preſcription.

The CONTENTS.

1. *Cauſes which make the Preſcription to ceaſe.*
2. *What things cannot be preſcribed.*
3. *Preſcription of debts due at a certain Term, or on a certain condition.*
4. *Preſcription does not run againſt Minors.*
5. *If a Major happens to be intereſted with a Minor.*
6. *In what ſenſe it is, that Preſcription does not run againſt abſent perſons.*
7. *In what ſenſe it is that the Wife's Dowry does not preſcribe.*
8. *Warranty does not preſcribe.*
9. *The poſſeſſor's knowing that the thing belongs to another, hinders the Preſcription.*
10. *If ſeveral Poſſeſſions are to be joined together, a good conſcience is neceſſary in every one of them.*
11. *Another vice in Poſſeſſion, which hinders Preſcription.*
12. *In what ſenſe the poſſeſſor cannot change the cauſe of his Poſſeſſion.*
13. *A vice in the Title hinders the Preſcription.*
14. *A vice in the Title which does not hinder the Preſcription.*
15. *A demand made Judicially interrupts the Preſcription.*
16. *A demand made by one of many Creditors.*
17. *A demand made againſt one of many Debtors.*
18. *Force does not interrupt the Poſſeſſion.*

I.

1. *Cauſes which make the Preſcription to ceaſe.*

THE effect of Preſcription ceaſes in the caſes where the Law renders it uſeleſs. Which happens either thro' the nature of the Thing, or by the quality of the Perſon againſt whom the Preſcription is pleaded, or by reaſon of ſome vice in the Poſſeſſion, or becauſe of the interruption, as we ſhall ſee in the Articles which follow[a].

[a] *This Article reſults from thoſe which follow.*

II.

2. *What things cannot be preſcribed.*

Seeing Preſcription is one of the ways of acquiring Property, we can preſcribe only ſuch Things as are in Commerce, and of which we may become Maſters. Thus, we cannot acquire by Preſcription the Things which Nature, or the Law of Nations, deſtine to a common and publick uſe, ſuch as the Banks of Rivers neceſſary for Navigation, the Walls and Ditches of Towns, and other the like places. Neither can we preſcribe that which the Law renders impreſcriptible,

preſcriptible, ſuch as in *France* the King's Demeſns, which cannot be acquired by Preſcription, not even of a hundred years [b].

[b] Uſucapionem recipiunt maximè res corporales, exceptis rebus ſacris, ſanctis, publicis populi Romani, & civitatum. *l. 9. ff. de uſurp. & uſuc. §. 1. inſt. eod.* Præſcriptio longæ poſſeſſionis, ad obtinenda loca juris gentium publica, concedi non ſolet. *l. 45. eod.*

Res fiſci noſtri uſucapi non poteſt. §. 9. *inſt. de uſuc. l. 2. C. comm. de uſuc.*

Viam publicam populus non utendo amittere non poteſt. *l. 2. ff. de via publica.*

By the Ordinance of Francis I. *bearing date the thirtieth of* June 1539. *every thing which belongs to the King's Demeſns is impreſcriptible, even by a Poſſeſſion of a hundred years. And by ſeveral Cuſtoms Quit Rents cannot be preſcribed againſt the Lord of the Manor.*

We have not comprehended indifferently in this Article all Things belonging to Towns, as one may be apt to think that they are comprehended in the firſt of the Texts cited on this Article: and we have put down in it only Things which are of publick uſe. For as to other Things belonging to Towns, or Churches, Hoſpitals, and Corporations, and which for that reaſon are out of Commerce, and cannot be alienated except for certain cauſes, and after a due obſervance of the formalities preſcribed for theſe ſorts of Alienations; they are not for all that impreſcriptible. But one may preſcribe by the time regulated by the Laws and Cuſtoms, the Goods and Rights belonging to Churches, to Towns, and Corporations, and to all other Bodies Politick. Thus in the Roman *Law theſe ſorts of Goods and Rights are preſcribed by forty years Poſſeſſion, even without a Title.* Nullum jus privatum, vel publicum, in quacumque cauſa, vel quacumque perſona, quod prædictorum quadraginta annorum extinctum eſt jugi ſilentio, moveatur. *l. 4. C. ae præſcr. 30. vel 40. ann. v. l. 6. eod.* Jubemus omnes qui in quacumque diœceſi, aut quacumque provinciâ, vel quolibet ſaltu vel civitate fundos patrimoniales, vel templorum, aut agnothetici, ſeu relevatorum jugorum, vel cujuſcunque juris, per quadraginta jugiter annos (poſſeſſione ſcilicet non ſolùm eorum qui nunc detinent, verùm etiam eorum qui antèa poſſederant, computanda) ex quocunque titulo, vel etiam ſine titulo hactenùs poſſederunt, vel poſteà per memoratum quadraginta annorum ſpatium poſſederint, nulla penitus ſuper dominio memoratorum omnium fundorum, vel locorum, vel domorum à publico actionem vel moleſtiam, aut quamlibet inquietudinem formidare. l. ult. C. de fundis patrim. Nov. 131. c. 6. *There was only the Burdens of the Publick Taxes upon Lands or Houſes, which were called* tributa, indictiones, functiones publicæ, civiles canones, *that could not be preſcribed.* l. 6. C. de præſcr. 30. vel 40. ann. *And many of the Cuſtoms of* France *do expreſly regulate, that one may preſcribe againſt the Church by a poſſeſſion of thirty years.*

We have not put down in this Article Things that are conſecrated; for they are of another nature than the Things ſpecified in the Article, which by their ſituation, and by the neceſſity of their uſe are impreſcriptible; whereas things conſecrated are not ſuch by their nature, but only by an expreſs deſtination, and therefore may be prophaned and alienated, and return again into Commerce. A Church may be prophaned, or demoliſhed, and tranſlated to another place. So that it is by the circumſtances, that we are to judge if a long Poſſeſſion may ſuffice to acquire the property of a place which had been formerly conſecrated: if there were ground to preſume that the place had been lawfully alienated, or if the Poſſeſſion appeared to be an Uſurpation. And the ſame thing might happen in a place of publick uſe, ſuch as the Ditch of a Town, or other Thing of the like nature, if any change had reſtored theſe Things to Commerce again, and had rendred them ſubject to Preſcription.

III.

The Preſcription of Actions for debts, or other things which are due upon ſome condition, and which cannot be demanded till after the condition has happened, begins to run only from the day on which the condition was accompliſhed, from which time the Creditor began only to have a right to demand the thing. And the Preſcription of debts which are to be paid at a certain Term, begins to run only after the Term is elapſed [c]. 3. *Preſcription of debts due at a certain Term, or on a certain condition.*

[c] Illud plus quàm manifeſtum eſt, in omnibus contractibus in quibus ſub aliqua conditione, vel ſub die certa vel incerta ſtipulationes, & promiſſiones, vel pacta ponuntur: poſt conditionis exitum, vel poſt inſtitutæ diei certæ vel incertæ lapſum, præſcriptiones triginta, vel quadraginta annorum, quæ perſonalibus, vel hypothecariis actionibus opponuntur, initium accipiunt. *l. 7. § 4. C. de præſcr. 30. vel 40. ann.*

IV.

One cannot preſcribe againſt Minors during their Minority, and the Preſcription does not begin to run till after they have attained the years of Majority [d]. For the time of Preſcription being given to Proprietors, that they may recover their Goods and their Rights, this time does not run againſt perſons, whom the Laws do not allow to have the Adminiſtration of their own Goods. 4. *Preſcription does not run againſt Minors.*

[d] Non eſt incognitum, id temporis quod in minori ætate tranſmiſſum eſt, longi temporis præſcriptioni non imputari. Ea enim tunc currere incipit, quando ad majorem ætatem dominus rei pervenerit. *l. 3. C. quib. non objic. long. temp. præſcr.*

We do not make here the diſtinction which the Roman *Law made in the matter of Preſcriptions, between Infants who have not attained to ripeneſs of Age, that is, to fourteen years in Males, and twelve in Females, and Adults, that is, thoſe who have attained to the ſaid ripeneſs of Age, but are ſtill Minors under the age of five and twenty years. This diſtinction of the* Romans *conſiſted in this, that the Adults, not being any more under the direction of Tutors, but under the care of Curators, the Preſcription of thirty years began to run againſt them, but it did not run againſt Infants, who were under the age of Adults.* l. 3. C. de præſcr. 30. vel 40. ann. *For ſince according to our Uſage in* France *Minority laſts to the age of five and twenty years, and that Minors being under Guardianſhip, are excluded from the Adminiſtration of their Eſtates, Preſcription does not run againſt them.*

V. If

V.

5. *If a Major happens to be intereſted with a Minor.*

If one that is Major happens to have a Right undivided with a Minor, the Preſcription which could not run againſt the Minor, will have no effect againſt the Major. Thus, for example, if a Service of a Paſſage is due to a Major and to a Minor, for a Ground which is common to them both, the one and the other having ceaſed to make uſe of this Right during the time ſufficient to preſcribe; the Service which the Minor could not loſe by Preſcription, will be preſerved likewiſe for the Major[e]. For the Service was due for the whole Ground, and the Minor having his Right undivided upon the Whole, there was no part of the Ground for which he had not preſerved the Right of Service.

[e] Si communem fundum ego & pupillus habemus, licet uterque non uteretur, tamen propter pupillum, & ego viam retineo. *l.* 10. *ff. quem. ſerv. amitt.* See the twenty firſt Article of the firſt Section of Services. *But if the Ground that belonged in common to the Major and to the Minor, had been divided into Shares or Portions, the Service which would be preſerved for the Portion of the Minor, would be loſt for the Portion of the Major; becauſe in this caſe their Cauſe was not common.*

VI.

6. *In what ſenſe it is that Preſcription does not run againſt abſent perſons.*

The ſame reaſon for which Preſcription does not run againſt Minors, hinders it likewiſe from running againſt thoſe whom a long abſence diſables from purſuing their Rights. Which is to be underſtood not only of an abſence on the account of Publick Buſineſs, but alſo of other abſences occaſioned by Accidents, ſuch as Captivity. And if the abſence has not laſted the whole time of the Preſcription, the time which it has laſted is deducted from it[f]. But if the Right which one ſhould pretend to make the abſent perſon loſe by Preſcription, had fallen to him during his abſence, and without his knowledge, ſuch as a Legacy, or an Inheritance; or if the abſence had laſted during the laſt years of the Preſcription, there would ſtill be more reaſon for his being reſtored to his Right; for one could not impute to him the letting that time ſlip without ſuing for his Right.

[f] Cùm per abſentiam tuam eos de quibus quereris, in res juris tui irruiſſe aſſeveres, neque ob medendi curam à comitatu noſtro diſcedere non poſſe palàm ſit præfectus prætorio noſter accerſitis his quos cauſa contingit, inter vos cognoſcet. *l.* 2. *C. quibus non objic. long. temp. præſcr.*

Si poſſeſſio inconcuſſa tunc controverſia perſeveravit, firmitatem ſuam teneat objecta præſcriptio, quam contra abſentes, vel reipublicæ cauſa, *vel maximè fortuito caſu*, nequaquam valere decernimus. *l.* 4. *eod.*

Judices abſentium qui cujuſlibet rei poſſeſſione privati ſunt, ſuſcipiant in jure perſonas, & auctoritatis ſuæ formidabile miniſterium objiciant. Atque ità tueantur abſentes, ut id ſolum diligenter inquirant an *ejus qui quolibet modo peregrinatur*, poſſeſſio ablata ſit quam propinquus, vel patens, vel proximus, vel amicus, vel colonus, quolibet titulo retineat. *l.* 1. *C. ſi per vim, vel alio mod. abſ. pert. ſit poſſ.*

Domino quolibet tempore reverſo, actionem poſſeſſionis recuperandæ indulgemus. *d. l.* Abſentibus enim officere non debet tempus emenſum, quod recuperandæ poſſeſſioni legibus præſtitutum eſt. *d. l.* In primis exigendum eſt ut ſit facultas agendi. *l.* 1. *ff. de diverſ. tempor. præſcr. l.* 25. *ff. de ſtip. ſerv.*

We muſt diſtinguiſh in the matter of Preſcriptions, two ſorts of Abſence; that which is ſpoken of in this Article, of perſons whom ſome cauſe keeps at a diſtance from the place of their abode, ſuch as an Embaſſy, a Captivity, and others the like, and that which has been mentioned at the end of the Preamble to the fourth Section, in relation to the Preſcription of ten or twenty years, that was in uſe among the Romans; *where it is ſaid, that a Preſcription grounded upon a Title, is acquired within the ſpace of twenty years, againſt abſent perſons; which has no relation to the abſence that keeps one at a diſtance from his dwelling, but reſpects barely the diſtance of one perſon from another, becauſe of the diſtance of their Habitations. It is eaſy to perceive, that we are not to confound together theſe two ſorts of Abſence, and in what manner that which concerns the Preſcription of twenty years, ought to have its effect in the places where this Preſcription is received. But as to the other Abſence, which is the Abſence of a perſon from his own Dwelling, it is not ſo eaſy to determine preciſely in what manner it can hinder the Preſcription. And altho' the Rule be conceived in general terms in this Article, as it is likewiſe in ſome of the texts cited upon it; yet we are not to underſtand it in ſuch a large ſenſe, as if all ſorts of Abſence hindred all Preſcription. For by the third Law,* C. de præſcr. 30. vel 40. ann. *it is ſaid, that Abſence does not hinder the Preſcription of thirty years. And as to the Preſcription of ten and twenty years, there may happen difficulties therein becauſe of the circumſtances, either of the cauſe of the Abſence, or of its ſhort duration, or others of the like nature, which may give occaſion to doubt, whether the abſence does, or does not hinder the Preſcription; concerning which it is not poſſible to give certain and preciſe Rules. And even as to the Preſcription of thirty years, if we ſuppoſe that the perſon againſt whom it is pleaded, had been abſent on an Embaſſy for ſome years, would it not be reaſonable to deduct from the time of the Preſcription the time of that Abſence? Thus it is by the circumſtances that we are to judge of the effect of Abſence in Preſcriptions.*

VII.

7. *In what ſenſe it is that the Wife's Dowry does not preſcribe.*

The Wife's Dowry cannot be preſcribed during the Marriage[g].

[g] Si fundum quem Titius poſſidebat bonâ fide, longi temporis poſſeſſione poterat ſibi quærere, mulier ut ſuum marito dedit in dotem, eumque petere neglexerit vir, cùm id facere poſſet, rem periculi ſui fecit. Nam licet lex Julia quæ vetat fundum

fundum dotalem alienari, pertineat etiam ad hujuſmodi acquiſitionem: non tamen interpellat eam poſſeſſionem quæ per longum tempus fit, ſi antequam conſtitueretur dotalis fundus jam cœperat. *l.* 16. *ff. de fund. dotal.*

This Article is to be underſtood according to the different Uſages of the Places. By the Cuſtoms of ſome of the Provinces in France, *the Wife's Dowry may be alienated by the Husband and Wife together, but not by the Husband alone, nor the Wife alone. In others the Alienation is null, altho' the Wife have conſented to it. Among theſe laſt Cuſtoms, ſome of them annul abſolutely the Preſcription of the Wife's Dowry. Others annul it only in caſe the Husband or his Heirs be inſolvent, ſo as that they are not able to make good the Dowry that is preſcribed. So that it is according to the different Diſpoſitions of the Cuſtoms, and their Uſages, that we are to regulate the manner in which Preſcription is to take place in Womens Dowries.* See the thirteenth Article of the firſt Section of the Title of Dowries.

VIII.

8. *Warranty does not preſcribe.*

The Action of Warranty does not preſcribe. For a Seller, for inſtance, and every other perſon who engages to warrant what he ſells, aſſigns, or gives upon any other Title, obliges himſelf thereby to maintain the Purchaſer in a peaceable poſſeſſion, ſo as never to be moleſted therein by any Right precedent to the Alienation. Thus, in what time ſoever the Eviction happens, as if after a Poſſeſſion of a hundred years, the Purchaſer is evicted of an Eſtate which is found to be part of the Demeſns of the Crown, the Heirs of his Author will be bound to warrant him againſt the ſaid Eviction [h].

[h] Empti actio longi temporis præſcriptione non ſubmovetur: licet poſt multa ſpatia rem evictam emptori fuerit comprobatum. *l.* 21. *C. de evict.* See the ſixth Article of the tenth Section of the Contract of Sale.

IX.

9. *The poſſeſſor's knowing that the thing belongs to another, hinders the Preſcription.*

There happens often in Poſſeſſions, vices or defects which hinder Preſcription. Thus, the knavery of the Poſſeſſor hinders him from preſcribing, whether it be that he has ſeized upon the Thing without any pretence of Right, or that having a Title, he was not ignorant of the defect thereof; as if he has purchaſed that which he knew the Seller could not alienate [i]. We ſhall ſee in the following Articles, the other vices of Poſſeſſions which may hinder Preſcription.

[i] Non capiet longâ poſſeſſione (qui) ſcit alienum eſſe. *l.* 3. §. 3. *ff. de acq. vel amitt. poſſ.* Si ab eo emas quem prætor vetuit alienare, idque tu ſcias, uſucapere non poteris. *l.* 12. *ff. de uſurp. & uſuc.* See the ſixth Article of the third Section.

X.

10. *If ſeveral Poſſeſſions are to be joined together, a good conſcience is neceſſary in every one of them.*

If a Poſſeſſor who pretends to have acquired the Preſcription, not having poſſeſſed the Thing during the whole time that is neceſſary for preſcribing, has occaſion to join to his own poſſeſſion that of his Author, as of a Teſtator, a Donor, a Seller, or other perſon from whom he derives his right; it is not enough that he himſelf has poſſeſſed it with a good conſcience, but it is neceſſary likewiſe that the poſſeſſion which he joins to his own, have been a poſſeſſion held with a good conſcience [l]. For all Poſſeſſion neceſſary for preſcribing, ought to have been without knavery, and without conſciouſneſs of another's right.

[l] Cùm quis utitur adminiculo ex perſona auctoris, uti debet cum ſua cauſa, ſuiſque vitiis. *l.* 13. §. 1. *ff. de acq. vel amitt. poſſ.*

De auctoris dolo exceptio emptori non objicitur. Si autem acceſſione auctoris utitur, æquiſſimum viſum eſt eum qui ex perſona auctoris utitur acceſſione, pati dolum auctoris. *l.* 4. §. 27. *ff. de dol. mali & met. except.* See the third Article of the third Section, and the ſixteenth Article of the fourth Section.

XI.

11. *Another vice in Poſſeſſion, which hinders Preſcription.*

Thoſe who poſſeſs for others, cannot preſcribe what they poſſeſs in this manner. Thus, he who poſſeſſes precariouſly [m], the Depoſitary [n], the Creditor who has a Pawn [o], the Uſufructuary [p], the Farmer or Tenant [q], cannot acquire by Preſcription, what they hold by theſe Titles. For in order to preſcribe, it is neceſſary to poſſeſs, and to poſſeſs as Maſter; and in all theſe ſorts of Poſſeſſion, it is the Maſter who poſſeſſes by him who holds the thing in his hands. And they who hold the Things by theſe Titles, cannot without knavery pretend to be Proprietors of them.

[m] Malè agitur cum dominis prædiorum, ſi tanta precario poſſidentibus prærogativa defertur, ut eos poſt quadraginta annorum ſpatia, qualiber ratione decurſa, inquietare non liceat. Cùm lex Conſtantiniana jubeat, ab his poſſeſſoribus initium non requiri, qui ſibi potiùs quàm actori poſſederunt. *l.* 2. *C. de præſcr.* 30. *vel* 40. *ann.*

[n] Rei depoſitæ proprietas apud poſſidentem manet, ſed & poſſeſſio. *l.* 17. §. 1. *ff. de poſſ.*

[o] *See the ſeventh Article of the fourth Section of Pawns and Mortgages.*

Quominus—— pignora (creditor) reſtituat debitori, nullo ſpatio longi temporis defenditur. *l. ult. C. de pign. act. l.* 10. *eod.* Pignori rem acceptam uſu non capimus, quia pro alieno poſſidemus. *l.* 13. *ff. de uſurp. & uſuc.* Poſſeſſor non eſt tametſi poſſeſſionem habeat. *l.* 15. §. 2. *ff. qui ſatisd. cog.* Licet juſtè poſſideat, non tamen opinione domini poſſidet.

poſſidet. *l.* 22. §. 1. *ff. de noxal. act. We add theſe texts, to ſhew by the by, what has been already remarked touching the different Ideas that one may conceive of Poſſeſſion.* See what has been ſaid on this ſubject, at the end of the Preamble to this Title.

[r] Fructuarius non poſſidet. §. 4. *inſt. per quas perſon. cuiq. acq.*

[s] Colonus & inquilinus ſunt in prædio, & tamen non poſſident. *l.* 6. §. 2. *ff. de precar.* Et per colonos, & inquilinos poſſidemus. *l.* 25. *ff. de acq. vel am. poſſ.*

XII.

12. *In what ſenſe the Poſſeſſor cannot change the cauſe of his Poſſeſſion.*

He who happens to have a thing in his cuſtody which he has not right to poſſeſs as Maſter, cannot change his condition, and make to himſelf another Title of Poſſeſſion, to the prejudice of the Right of another perſon. Thus, for inſtance, he who is in poſſeſſion of a Ground as Farmer, cannot make himſelf Proprietor thereof by a feigned purchaſe from another Seller, than the Maſter to whom he is Farmer. For this new Title would not change the quality of his Poſſeſſion, and would not give him the right to poſſeſs as Maſter, nor to preſcribe againſt him of whom he held the Farm. Thus, for another inſtance, the Heir of a Depoſitary cannot pretend to poſſeſs the thing depoſited, as Heir, and he will always have the quality of a Depoſitary [t]. But if an Heir happening to diſcover that a Ground which he poſſeſſed as Heir, was not part of the Inheritance, had bought it honeſtly of the perſon who pretended to be Maſter of it, in order to poſſeſs it, not any longer as Heir, but by the Title of Sale, one could not accuſe him of having changed the cauſe of his Poſſeſſion in order to palliate a vicious Poſſeſſion, with an apparent Title; and he would acquire by this new Title, both the right to poſſeſs as Maſter, and the right to preſcribe [t].

[t] Illud à veteribus præceptum eſt, neminem ſibi ipſum cauſam poſſeſſionis mutare poſſe. *l.* 3. §. 19. *ff. de acq. vel amitt. poſſ.*

Cùm nemo cauſam ſibi poſſeſſionis mutare poſſit, proponaſque colonum nulla extrinſecùs accidente cauſa, excolendi occaſione, ad iniquæ venditionis vitium eſſe prolapſum, præſes provinciæ inquiſita fide veri dominii tui jus convelli non ſinet. *l.* 5. *C. de acq. & ret. poſſ.*

Quod vulgò reſpondetur, cauſam poſſeſſionis neminem ſibi mutare poſſe, ſic accipiendum eſt ut poſſeſſio non ſolùm civilis, ſed etiam naturalis intelligatur; & propterea reſponſum eſt, neque colonum, neque eum apud quem res depoſita, aut cui commodata eſt, lucri faciendi cauſa pro hærede uſucapere poſſe. *l.* 2. §. 1. *ff. pro hærede.*

[t] Quod ſcriptum eſt apud veteres, neminem ſibi cauſam poſſeſſionis poſſe mutare, credibile eſt de eo cogitatum & qui corpore & animo poſſeſſioni incumbens, hoc ſolum ſtatuit, ut alia ex cauſa id poſſideret: non ſi quis dimiſſa poſſeſſione prima ejuſdem rei, denuò ex alia cauſa poſſeſſionem nanciſci velit. *l.* 19. §. 1. *ff. de acq. vel am. poſſ.*

XIII.

13. *A vice in the Title, hinders the Preſcription.*

It is likewiſe a vice in the Poſſeſſion, that it has begun by a falſe Title, and of which the defect was ſuch that the Poſſeſſor ought to have known it, altho' he ſhould pretend to have been ignorant thereof. Thus, for example, he who buys of a Tutor a Houſe or Lands belonging to his Minor, without obſerving the formalities, cannot preſcribe it, under pretext that he verily believed that the Tutor had power to alienate it. For he ought to have known, that the Goods of the Minor could not be alienated except for neceſſary cauſes, and when the formalities preſcribed by the Laws in ſuch Alienations, were obſerved. And this being ſuch a Rule, that his ignorance thereof could avail him nothing, his condition is not diſtinguiſhed from that of a Purchaſer who was apprized of the defect of the Title [u]. Thus, for another example, he who purchaſes a Houſe or Lands held of a Church-Benefice, and which is alienated by the Incumbent, without a neceſſary cauſe, and without obſerving the formalities, cannot preſcribe them.

[u] Nunquàm in uſucapionibus juris error poſſeſſori prodeſt. Et ideò Proculus ait, ſi per errorem initio venditionis tutor pupillo auctor factus ſit, vel poſt longum tempus venditionis peractum, uſucapi non poſſe, quia juris error eſt. *l.* 31. *ff. de uſurp. & uſuc.* Si ſcias pupillum eſſe, putes tamen pupillis licere res ſuas ſine tutoris auctoritate adminiſtrare, non capies uſu, quia juris error nulli prodeſt. *l.* 2. §. 15. *ff. pro emptore.* See the ninth Article of the firſt Section of the Rules of Law.

XIV.

14. *A vice in the Title, which does not hinder Preſcription.*

There may be vices in the Titles which may be ſufficient to annul them, but not ſufficient to hinder Preſcription. Thus, for example, if the perſon to whom a Houſe or Lands have been deviſed, has been put into poſſeſſion thereof by him whom he took to be Heir, and after the ſaid Legatee had enjoyed the ſaid Houſe and Lands for a time ſufficient to acquire Preſcription, it be found that he who called himſelf Heir, was not the true Heir, or that he had Co-heirs, and that the true Heir, or Co-heirs, trouble the Legatee in his Poſſeſſion, and alledge againſt him nullities in the Teſtament,

as that it was not atteſted by a ſufficient number of Witneſſes duly qualified, or that other formalities were wanting; theſe defects of the Teſtament will not hinder the effect of the Preſcription of this Legatee, whether he was ignorant of them, or whether he knew them. For he had the apparent Heir's approbation of the Teſtament; which was ſufficient, together with his own good conſcience, to acquire to him the Right of Preſcription [u].

[u] *This is a conſequence of the third Article of the third Section. There is this difference between the caſe of this Article, and that of the foregoing Article; that in this the vice of the Teſtament ceaſed by the approbation of the Heir, and that the Will of the Teſtator might be executed notwithſtanding the want of the formalities in the Teſtament, but in the caſe of the foregoing Article, the vice of the Title was the incapacity of the perſon who had alienated, contrary to the prohibition of the Law, the Goods of a Minor.* V. l. 25. §. 6. ff. de hæred. pet.

XV.

15. A demand made Judicially interrupts the Preſcription.

The Preſcription is interrupted, and ceaſes to run by making a Demand in a Court of Juſtice againſt the Poſſeſſor. For in order to preſcribe, it is neceſſary that the Poſſeſſion have been peaceable, and with a good conſcience: and the Demand in a Court of Juſtice makes the Poſſeſſion to be no longer peaceable, and makes the poſſeſſor to hold it afterwards with a bad conſcience, when he knows of the other's right [x].

[x] Nec bonâ fide poſſeſſionem adeptis, longi temporis præſcriptio, poſt motam litis conteſtatæ completa, proficit. Cùm poſt motam controverſiam, in præteritum æſtimetur. *l.* 10. *C. de præſcr. long. temp.*

Ità demùm (poſſeſſio eſt) legitima, cùm omnium adverſariorum ſilentio & taciturnitate firmatur. Interpellatione verò controverſiâ progreſſâ, non poſſe eum intelligi poſſeſſorem, qui licet poſſeſſionem corpore teneat; tamen ex interpoſita conteſtatione, & causâ in judicium deductâ, ſuper jure poſſeſſionis vacillet, ac dubitet. *l.* 10. *C. de acq. & ret. poſſ.*

What is ſaid in this Article is to be underſtood of a Demand that is reduced into a Libel, which explains what is demanded. As to which it is neceſſary to remark, that whereas in the Roman *Law he who ſummoned his adverſary, was bound only to explain in the preſence of the Judge what it was that he demanded; and that even* Juſtinian *had decreed, that a general Summons to appear before the Judge, without mentioning any one of the things which the Plaintiff might demand, ſhould be deemed ſufficient for all his Claims, and ſhould interrupt the Preſcription,* l. ult. C. de ann. excep. *By the Ordinance all Demands ought to be by way of Libel, and the Citations are null if the Cauſe of Action is not therein explained.* See the Ordinance of 1667. tit. 2. art. 1. See the Remark on the fifth Article of the firſt Section of Intereſt.

XVI.

16. A demand made by one of many Creditors.

If one and the ſame Right, whether it be that of Property, or any other, belongs in common to many perſons, the Action entred by any one of them will interrupt the Preſcription for them all. For it is the whole Right that is demanded, and every one preſerves by this demand that ſhare of the Right which belongs to him [y].

[y] Cùm quidam rei ſtipulandi certos habebant reos promittendi, vel unus forte creditor duos vel plures debitores habebat, vel è contrario multi creditores unum debitorem —— nobis pietate ſuggerente videtur eſſe humanum, ſemel in uno eodemque contractu, qualicumque interruptione vel agnitione adhibita, omnes ſimul compelli ad perſolvendum debitum: ſive plures ſint rei, ſive unus: ſive plures ſint creditores, ſive non ampliùs quàm unus. Sancimuſque in omnibus caſibus quos noſter ſermo complexus eſt, aliorum devotionem, vel agnitionem, vel ex libello admonitionem, aliis debitoribus præjudicare, & aliis prodeſſe creditoribus. Sit itaque generalis devotio, & nemini liceat alienam indevotionem ſequi. Cùm ex una ſtirpe, unoque fonte unus effluxit contractus: vel debiti cauſa ex eadem actione apparuit. *l. ult. C. de duobus reis.* See the following Article, and the remark which is there made; the ninth Article of the firſt Section of Solidity, *&c.* and the fifth Article of the ſecond Section of the ſame Title.

XVII.

17. A demand made againſt one of many Debtors.

If ſeveral perſons happen to be bound for one and the ſame debt, or to poſſeſs Houſes or Lands in common, the Action entred againſt any one of them by the Creditor of the ſaid debt, or by the Proprietor of the ſaid Houſes or Lands, will interrupt the Preſcription with regard to them all; for the demand was made for the whole Right [z].

[z] *See the Text cited on the preceding Article.*

It is to be obſerved upon this and the foregoing Article, that it is no matter although there be no Solidity either among the Debtors of one and the ſame Sum of Money, or among the poſſeſſors of the ſame Houſes and Lands, or among the Creditors or Proprietors, and that it is ſufficient to interrupt the Preſcription with reſpect to them all by a Demand made by any one, or againſt any one of them, that it be one and the ſame Thing, or one and the ſame Right which is common to them. Thus, for example, if the Creditor to an Inheritance demands his whole debt from one of many Heirs of his Debtor, he will interrupt the Preſcription with regard to them all, although each of them be indebted only for his portion. For this Creditor may be ignorant of the number and Right of the Heirs; and although he ſhould know it, yet he may demand the whole debt from any one of them. Thus, when one of the Heirs or Executors of a Creditor demands from the Debtor of the deceaſed what he owed him, he interrupts the Preſcription

ſcription for his Co-Heirs or Co-Executors. For he makes his demand for the whole debt, and he has an intereſt that the whole debt be preſerved intire.

XVIII.

18. *Force does not interrupt the Poſſeſſion,* He whoſe Poſſeſſion is interrupted only by an act of violence, without any form of Law or Juſtice, is nevertheleſs conſidered as Poſſeſſor, becauſe he has the right to enter again to his Poſſeſſion. Thus the time of the Uſurper's poſſeſſion does not interrupt his[a].

[a] Si quis vi de poſſeſſione dejectus, perindè haberi debet ac ſi poſſideret: cum interdicto de vi recuperandæ poſſeſſionis facultatem habeat. *l.* 17. *ff. de acq. vel amitt. poſſ.*

THE

THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK IV.

Of the CONSEQUENCES which annul, or diminiſh ENGAGEMENTS.

WE muſt not confine to the matters which ſhall be treated of in this Book, all the manners of annulling or diminiſhing Engagements; for Proofs, an Oath, Preſcriptions, have this effect, and we muſt alſo reckon them in this number. But it was not here that we propoſed to treat of them, and their proper place was in the foregoing Book, for the reaſon that has been remarked in the Plan of the Matters[a]; that Proofs, an Oath, and Preſcriptions having theſe two oppoſite effects, both to fortify Engagements, and to annul or diminiſh them; it was natural, that ſeeing they were to be treated of only in one place, they ſhould be conſidered in the firſt place where it ſhould be neceſſary to explain the Rules thereof. Thus, we are to conſider the Rules of Proofs, of an Oath, and of Preſcriptions, as a matter common, both to the third Book, and to this.

[a] *See the fourteenth Chapter of the Treatiſe of Laws.* n. 12.

There are three ways of annulling or diminiſhing an Engagement. The firſt is, by executing and performing it; either *Three ways of annulling or diminiſhing*

Engagements.

either in the whole, as he does who pays a Sum which he owes: or in part, if he pays only a part of the debt upon account. The ſecond, by procuring the Engagement to be declared null by a Court of Juſtice, either in the whole, as if it was Money lent to a Minor who had ſquandered it away upon his pleaſures: or in part, if only one part of the Money lent was imployed to profitable uſes. The third, by ſubſtituting a ſecond Engagement in the room of the firſt, ſo that there be only the ſecond which ſubſiſts, the firſt being annulled.

Order of the Titles of this Book.

Payments which we ſhall treat of in the firſt Title of this Book, are of the firſt of theſe three ways: And Compenſations, which are nothing elſe but mutual Payments, and which ſhall be conſidered under the ſecond Title, are of the ſame nature. Reſciſions of Contracts, and Reſtitutions of Things to their firſt eſtate, which ſhall be the ſubject matter of the laſt Title, belong to the ſecond of theſe ways of annulling Engagements. And Novations and Delegations, which ſhall be explained in the third and fourth Titles, are of the third ſort.

Ceſſion of Goods, which ſhall be the ſubject matter of the fifth Title, is a mixture of the two firſt of theſe three ways. For it diſcharges a part of the Debts, and if it happens that the Effects yielded up by a Debtor be Real Eſtate which is ſufficient to ſatisfy ſome of the Creditors who have preferable Mortgages, their debts are entirely acquitted and annulled; and the Debts of the other Creditors, whom the Remainder of the ſaid Real Eſtate is not ſufficient to clear off, are diminiſhed in proportion to what they receive. And if there be only Moveables, which are not ſufficient to clear off all the Creditors, the Ceſſion of Goods will not acquit any one debt entirely, but diminiſh them all. For every Creditor will come in for his proportion of the Price of the Moveables; as ſhall be explained in the fifth Title. And the Ceſſion of Goods has likewiſe this effect, with regard to the Creditors who might arreſt the perſon of the Debtor, that it annuls in this his Engagement, and that after he has ſurrendred all his Effects, he is no longer liable to this Arreſt.

As the matters of the preceding Book, where we have treated of all that can add to Engagements, or ſtrengthen and corroborate them, are common to all ſorts of Engagements, whether they have been formed by Covenant, or without Covenant; ſo the matters of this fourth Book are likewiſe common to all ſorts of Engagements of theſe two kinds.

TITLE I.

Of PAYMENTS.

ALthough we underſtand commonly by the word *Payment*, only that manner in which thoſe who are indebted in Sums of Money acquit themſelves of their Obligation, by paying Money; yet we may give the name of Payment in general to all the manners in which Debtors acquit themſelves of their Obligations. For whatever frees the Debtor from his Obligation, is inſtead of Payment. And in this ſenſe we may comprehend under the word *Payment*, Compenſations, Novations, and Delegations. But ſeeing theſe three manners of Payment have peculiar characters which give them a nature quite different from that of ſimple Payment; it has been thought proper to diſtinguiſh them under their proper Titles: and in this Title we ſhall only conſider what concerns Payments in general; what is their nature, their effects, the divers manners in which perſons may acquit themſelves of their Obligations, who may make a Payment or receive it, and in what manner Payments are applied to the ſeveral debts; all which matters ſhall be treated of in the Sections of this Title.

The Reader may conſult upon the ſubject matter of Payments, the Title, *Of thoſe who receive what is not due to them*; ſeveral Rules whereof have relation to this matter.

SECT. I.

Of the nature of Payments, and of their effects.

The CONTENTS.

1. *Definition of Payments.*
2. *In what manner the Debtor acquits himſelf.*
3. *The word* acquitting, *is applicable to all Engagements.*
4. *Payment of what was not due, or what one could not have been compelled to pay.*
5. *One may pay before the term.*
6. *Effect of the Payment.*
7. *Payment made by another than the Debtor.*
8. *The Payment frees the Sureties, and the Mortgages.*
9. *The Payment which one makes that he may have an Aſſignment to the debt, does not extinguiſh the debt.*
10. *The Sale of the Pawn does not acquit the debt, except in ſo much as is raiſed by the Sale.*
11. *Several Acquittals for ſeveral Debtors, by one ſingle Payment.*
12. *Two Obligations of one and the ſame Debtor, acquitted by one ſingle Payment.*
13. *Effect of general or particular Acquittances.*
14. *He who alledges a Payment, ought to prove it.*
15. *Payment of the Rents for three years laſt paſt, proves the payment of the former years.*
16. *The Creditor is not obliged to divide his Payment.*

I.

1. *Definition of Payments.*

PAyments are the ways in which a Debtor acquits himſelf of what he owed, or of a part of it[a].

[a] Liberationis verbum eandem vim habet quàm ſolutionis. *l.* 47. *ff. de verb. ſignif.*

II.

2. *In what manner the Debtor acquits himſelf.*

Whatever annuls the debt, or diminiſhes it, is in lieu of Payment; whether it be that the Debtor gives to the Creditor Money, or other things which he may owe him, or that he acquits himſelf of his Obligation by ſatisfying him ſome other way, purſuant to the Rules which ſhall be explained in the ſecond Section[b].

[b] Solutionis verbo ſatisfactionem quoque omnem accipiendam placet. *l.* 176. *ff. de verb. ſign.* See the ſecond Section.

III.

3. *The word* acquitting, *is applicable to all Engagements.*

As we give the name of debt, to every thing that is due not only from Debtors of Sums of Money, or of things of another nature, but alſo from thoſe who are obliged either to do ſome thing, as an Undertaker of a Work, or to reſtore a thing which is not theirs, as the Depoſitary, and he who has borrowed a thing for uſe[c]; ſo likewiſe we conſider as Payments or Acquittals, all the manners in which one acquits, or delivers himſelf from Engagements of all kinds[d].

[c] Credendi generalis appellatio eſt. Ideò ſub hoc titulo prætor & de commodato, & de pignore edixit. Nam cuicumque rei aſſentiamur, alienam fidem ſecuti, mox recepturi quid ex hoc contractu, credere dicimur. *l.* 1. *ff. de reb. cred.*

[d] Solvere dicimus eum qui fecit quod facere promiſit. *l.* 176. *ff. de verb. ſignif.*

IV.

4. *Payment of what was not due, or what one could not have been compelled to pay.*

The Payment preſuppoſing the debt, he who has paid through miſtake, that which was not due, may recover it[e]. But if he has paid nothing but what was due in Equity, altho' the debt had been ſuch that he could not have been condemned in a Court of Juſtice to pay it, he cannot demand reſtitution of what he has paid[f]. Thus, for example, if a Minor being come of Age, pays a Sum of Money which he had borrowed in his Minority, upon an Obligation againſt which he could have been relieved, he cannot revoke the Payment which he has made. For by paying the Money, he has confirmed and ratified his Obligation[g].

[e] Si quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt. *l.* 1. §. 1. *ff. de cond. ind.*

[f] Naturales obligationes non ex eo ſolo æſtimantur, ſi actio aliqua earum nomine competit, verùm etiam eo, ſi ſoluta pecunia repeti non poſſit. *l.* 10. *ff. de obl. & act.* See touching Payments of that which is not due, the firſt Section of thoſe who receive what is not due to them.

[g] Placet, ut & eſt conſtitutum, ſi quis major factus comprobaverit quod minor geſſerat, conſtitutionem ceſſare. *l.* 3. §. 1. *ff. de minor.* See the eleventh Article of the firſt Section of thoſe who receive that which is not due to them.

This Article is conceived in this manner, that he who pays that which was not due, may recover it, and not that he who pays what he owed not, may recover it. For if any one pays for another, altho' he was not obliged to do it, he cannot demand back what he has paid. See the ſecond Article of the third Section.

V. One

V.

5. *One may pay before the term.* If the Debtor who had a term fixed for payment, has a mind to pay before-hand, the Creditor cannot compel him to wait till the term. For all the time of the delay is given to the Debtor, that he may acquit himſelf when he can[h]. And if he cannot do it ſooner, he ought to do it at the term. But if he pays before-hand, he cannot take back what he has paid, for he owed it[i].

[h] Quod certa die promiſſum eſt, vel ſtatim dari poteſt. Totum enim medium tempus ad ſolvendum promiſſori liberum relinqui intelligitur. *l.* 70. *ff. de ſolut.*

[i] *See the ſecond Article of the firſt Section of thoſe who receive what is not due to them.*

VI.

6. *Effect of the Payment.* The effect of Payment is to annul the debt, if one pays the whole[l], or to diminiſh it in proportion to what is paid.

[l] Tollitur omnis obligatio ſolutione ejus quod debetur. *Inſt. quib. mod. toll. obl.*

VII.

7. *Payment made by another than the Debtor.* If a Payment is made for a Debtor by another perſon than himſelf, he will nevertheleſs be acquitted from his Obligation to the Creditor, who has received his Payment: and the debt, with regard to the ſaid Creditor, will be annulled, although the Debtor knew nothing of the Payment, and even although it had been made againſt his will; becauſe the Creditor was at liberty to receive what was due to him, and when he has received it, the debt is acquitted[m].

[m] Nec intereſt quis ſolvat, utrum ipſe qui debet, an alius pro eo. Liberatur enim & alio ſolvente, ſive ſciente, ſive ignorante debitore, vel invito eo ſolutio fiat. *inſt. quib. mod. toll. obl.* Solvere pro ignorante, & invito, cuique licet. *l.* 53. *ff. de ſolut.*

This Article ſuppoſes that a third perſon may pay for the Debtor, as ſhall be explained in the ſecond Article of the third Section.

VIII.

8. *The Payment frees the Sureties, and Mortgages.* The debt being annulled by the Payment, the Creditor has no longer any right upon the Pawns and Mortgages which he had for his ſecurity; and the Bail and Sureties are no longer obliged. For they were Acceſſories to the Obligation, which do not ſubſiſt after it is acquitted[n].

[n] In omnibus ſpeciebus liberationum, etiam acceſſiones liberantur: putà adpromiſſores, hypothecæ, pignora. *l.* 43. *ff. de ſolut.*

IX.

9. *The Payment which one makes, that he may have an Aſſignment to the debt, does not extinguiſh the debt.* Although the Payment extinguiſhes the debt, yet if a Creditor who is paid by another than his Debtor, aſſigns over his debt to him who pays him; the debt will ſubſiſt, and will paſs from the perſon of the Creditor to the Aſſignee. For what is tranſacted between them, is not a Payment to diſcharge the Debtor, but a Sale which the Creditor makes of his Right to him who pays him. Which is to be underſtood of an Aſſignment made either before, or at the time of Payment. For if the Payment had been made before the Aſſignment, the debt being acquitted, the Creditor could not make over a Right which was no longer in being[o].

[o] Modeſtinus reſpondit, ſi poſt ſolutum ſine ullo pacto omne, quod ex cauſa tutelæ debeatur, actiones poſt aliquod intervallum ceſſæ ſint, nihil ex ceſſione actum, cùm nulla actio ſuperfuerit. Quod ſi ante ſolutionem hoc factum eſt, vel cùm conveniſſet, *ut mandarentur actiones*, tunc ſolutio facta eſſet, mandatum ſubſecutum eſt, ſalvas eſſe mandatas actiones: cùm noviſſimo quoque caſu pretium magis mandatarum actionum ſolutum, quàm actio quæ fuit, peremptа videatur. *l.* 76. *ff. de ſolut.*

X.

10. *The Sale of the Pawn does not acquit the debt, except in ſo much as is raiſed by the Sale.* If a Creditor who had taken Pawns for his ſecurity, receives in payment the price of the Pawns, ſold either by order of the Judge, or by the Debtor, and the Money raiſed by the Sale of the Pawns be not ſufficient to acquit the whole debt; he will remain ſtill Creditor for the overplus, although the Pawns ſhould be worth more than the debt. For the perſonal Obligation, to which the Pledge was only an Acceſſory, ſubſiſts ſtill for what remains of the debt[p]. Unleſs it had been agreed, that the Pawns ſhould be inſtead of an entire payment, without any regard to the price which ſhould be raiſed by the Sale of them.

[p] Adverſus debitorem electis pignoribus, perſonalis actio non tollitur, ſed eo quod de pretio ſervari potuit, in debitum computato, de reſiduo manet integra. *l.* 10. *C. de obl. & act.*

XI.

11. *Several Acquittals for ſeveral Debtors, by one ſingle Payment.* It often happens, that by the effect of one ſingle Payment, many Obligations of divers perſons are acquitted; as when a Debtor pays, by order of his Creditor, to another perſon to whom the ſaid Creditor was indebted; which might run into ſeveral Payments from one Creditor to another. But although there appear in ſuch caſes one ſingle Payment, yet there are in reality as many

Payments

Payments made as there are debts paid. For it is the ſame thing, as if every one of thoſe who are paid, and who pay to others by this one Payment, did receive from the hands of his Debtor that which is due to him, and deliver it into the hands of his Creditor. And theſe Payments which are eclipſed in outward appearance, are true in effect [q].

[q] Cùm juſſu meo id quod mihi debes ſolvis creditori meo, & tu à me, & ego à creditore meo liberor. *l.* 64. *ff. de ſolut.*

Eum rei geſtæ ordinem futurum, ut pecunia ad te à debitore tuo, deinde à te ad mulierem perveniret. Nam celeritate conjungendarum inter ſe actionum, unam actionem occultari. *l.* 3. §. 12. *ff. de don. int. vir. & ux.*

XII.

12. *Two Obligations of one and the ſame Debtor, acquitted by one ſingle Payment.*

It may alſo happen that one and the ſame Payment acquits at one inſtant two Obligations of one and the ſame perſon to the ſame Creditor: as for example, if a Teſtator who is Creditor to a Minor who might get himſelf relieved from his Obligation, leaves him a Legacy upon this condition, that he ſhall pay the debt to his Executor. For in this caſe, the Payment which the ſaid Legatee ſhall make will acquit his debt, and will ſatisfy the condition impoſed for the Legacy [r].

[r] In numerationibus aliquando evenit, ut una numeratione duæ obligationes tollantur uno momento: veluti ſi quis pignus pro debito vendiderit creditori. Evenit enim ut ex vendito tollatur obligatio debiti. Item ſi pupillo qui ſine tutoris auctoritate mutuam pecuniam accepit, legatum à creditore fuerit, ſub ea conditione, *ſi eam pecuniam numeravit*, in duas cauſas videri eum numerâſſe: & in debitum ſuum, ut Falcidiam hæredi imputetur, & conditionis gratia, ut legatum conſequatur. *l.* 44. *ff. de ſolut.*

XIII.

13. *Effect of general or particular Acquittances.*

Seeing a Debtor may owe to one and the ſame Creditor different debts for diverſe cauſes, and ſeeing he may either pay only ſome of them, or pay them all; one may comprehend in one and the ſame Acquittance either all the payments, if all the debts are paid, or a part of them. And the effect of ſuch an Acquittance is, to annul either the debts only which are ſpecified therein, or all that is due, if the Acquittance is general, and conceived in terms which comprehend the whole [s].

[s] Pluribus ſtipulationibus factis, ſi promiſſor ita accepto rogâſſet quod ego tibi promiſi, habeſne acceptum? ſi quidem apparet quid actum eſt, id ſolum per acceptilationem ſublatum eſt: ſi non apparet, omnes ſtipulationes ſolutæ ſunt. *l.* 6. *ff. de acceptil.*

Et uno & pluribus contractibus, vel certis, vel incertis; vel quibuſdam exceptis cæteris, & omnibus ex cauſis una acceptilatio, & liberatio fieri poteſt. *l.* 18. *ff. de acceptil.*

Per Aquilianam ſtipulationem pacto ſubditam, obligatione præcedente ſublata, & acceptilatione quæ fuit inducta, perempta, et qui ex nulla cauſa reſtitui poteſt, omnis agendi via præcluditur. *l. ult. C. de acceptil.*

XIV.

14. *He who alledges a Payment ought to prove it.*

As he who pretends to be a Creditor ought to eſtabliſh his Right; ſo he who acknowledges the debt, and alledges that he has paid it, ought to make proof of it [t].

[t] Solutionem aſſeveranti probationis onus incumbit. *l. ult. C. de ſolut.*

XV.

15. *Payment of the Rents for three years laſt paſt, proves the payment of the former years.*

The Payment for three ſubſequent years of the Arrears of Quit-Rents, Rents, and other Annual Duties, has this effect, that he who proves the Payment for three years laſt paſt, is diſcharged from the preceding years, although he ſhould produce no Acquittance for them. Unleſs it ſhould be made appear by good proofs that the Arrears of former years are ſtill due, as if there were a Promiſe to pay them, or a Reſervation of them in the latter Acquittances. For it is juſt to preſume, that the Creditor would not have taken the three laſt Payments without receiving either ſome Acknowledgment of the old Arrears remaining ſtill due, or reſerving them. And this Preſumption has its effect even with regard to the Rents of the Crown againſt thoſe who are intruſted with the Receipt of them [u].

[u] Quicumque de provincialibus, & collatoribus, decurſo poſthac quantolibet annorum numero, cùm probatio aliqua ab eo tributariæ ſolutionis expoſcitur, ſi trium cohærentium ſibi annorum apochas ſecuritateſque protulerit, ſuperiorum temporum apochas non cogatur oſtendere. Neque de præterito ad illationem functionis tributariæ coërceatur. Niſi fortè aut curialis, aut quicunque apparitor, vel optio, vel actuarius, vel quilibet publici debiti exactor ſive compulſor, poſſeſſorum vel collatorum habuerit cautionem: aut id quod repoſcit, deberi ſibi manifeſta geſtorum aſſertione patefecerit. *l.* 3. *C. de apoch. public.*

But if it were a new Farmer who had farmed ſome part of the King's Revenue, and had received the three firſt years of his Farm, his Acquittances ought to be of no prejudice to his Predeceſſor who had the Farm before him, as to the years which ſhould remain due to him.

XVI.

16. *The Creditor is not obliged to divide his Payment.*

The Creditor having a right to demand the entire payment of his whole debt, is not obliged to divide it, and to receive ſuch part of it as the Debtor is willing to acquit [x]. But if the Debtor had any ground to conteſt a part of the debt, and ſhould offer to pay the remainder; it would be prudent for the

Judge

Judge in this caſe, to oblige the Creditor to receive what ſhould be offered, purſuant to the Rule explained in another place[y].

[x] Quidam exiſtimaverunt, neque eum qui decem peteret cogendum quinque accipere. & reliqua perſequi: neque eum qui fundum ſuum diceret, partem duntaxat judicio proſequi. *l.* 21. *ff. de ord.* See the eighth Article of the ſecond Section.

[y] *See the fifth Article of the ſecond Section of the Loan of Money.*

SECT. II.

Of the ſeveral ways of making Payment.

The CONTENTS.

1. *Diverſe manners of Payment.*
2. *Delegation is a Payment.*
3. *An Aſſignment of a debt, without Warranty, in order to be diſcharged, is a Payment.*
4. *Novation is a Payment.*
5. *The Oath of the debtor, when the debt is referred to it, or a Sentence, are inſtead of Payment.*
6. *If the thing that is due periſhes, the debtor is acquitted.*
7. *If the Creditor ſucceeds to the Surety, or the Surety to the Creditor.*
8. *Conſignment of the debt, in caſe the Creditor refuſes his payment.*
9. *One cannot pay one thing for another.*
10. *A Work which ought to be made by the hand of a certain Workman.*
11. *The Ceſſion of Goods makes a payment in another thing than what was due.*
12. *If one gives in payment of a Sum of Money, another thing than Money.*
13. *If a part of the Land given in payment, is evicted from the Creditor.*
14. *Payment made in a Species of Money that is juſt going to be cried down.*

I.

1. *Diverſe manners of Payment.*

THE moſt natural way of paying a debt, is to pay the ſame thing in kind which one owes, as Money for Money, Corn for Corn. But in what other manner ſoever it happen that the Creditor be ſatisfied, or ought to be ſatisfied, we conſider as a Payment every thing that is inſtead of it, and which extinguiſhes the debt[a]. Thus, for example, a Compenſation acquits on both ſides that which is compenſated, as ſhall be explained in the following Title.

[a] Satisfactio pro ſolutione eſt. *l.* 52. *ff. de ſolut.* Solutionis verbum pertinet ad omnem liberationem quoquo modo factam. *l.* 54. *eod.* See the ſecond Article of the firſt Section.

II.

2. *Delegation is a Payment.*

If a Debtor delegates his Debtor to his Creditor, that is, if he ſubſtitutes in his place his Debtor, who obliges himſelf to the Creditor for the ſame thing, and in ſuch a manner that the Creditor is contented with this new Debtor, and diſcharges the other, this Delegation will acquit the firſt Debtor[b].

[b] Solvit qui reum delegat. *l.* 8. §. 3. *ff. ad Vell.* Qui debitorem ſuum delegat, pecuniam dare intelligitur, quanta ei debetur. *l.* 18. *ff. de fidejuſſ.* See the Title of Delegations.

III.

3. *An Aſſignment of a Debt, without Warranty, in order to be diſcharged, is a Payment.*

If a Creditor accepts from his Debtor an Aſſignment to a debt, without Warranty, and delivers up to the Debtor his Bond, or gives a diſcharge of it; this Aſſignment will be inſtead of a Payment, which will annul the debt, although it ſhould happen that the Creditor ſhould recover no part thereof[c].

[c] Satisfactio pro ſolutione eſt. *l.* 52. *ff. de ſolut.*

IV.

4. *Novation is a Payment.*

If the Creditor and Debtor agree to innovate the debt, that is, if inſtead of the firſt Obligation the Debtor obliges himſelf by another of another nature, as if he who owed the Price of a Sale, or the Rent of a Houſe, gives a Bond for it as for borrowed Money, the Creditor making no reſervation of the firſt debt; the ſecond Obligation will be inſtead of a Payment of the firſt, which by this Novation will be acquitted and annulled[d].

[d] Novatio eſt prioris debiti, in aliam obligationem vel civilem vel naturalem, tranſfuſio atque tranſlatio. Hoc eſt, cùm ex præcedenti cauſâ ita nova conſtituatur, ut prior perimatur. *l.* 1. *ff. de novat.* See the Title of Novations. See the ſixth Article of the firſt Section of the Loan of Money.

V.

5. *The Oath of the Debtor, when the Debt is referred to it, or a Sentence, are inſtead of Payment.*

The Debtor to whoſe Oath the debt has been referred, and who has ſworn either that he owed nothing, or that he has paid the debt, is quit in the ſame manner as if he had actually paid it[e]. And if without making Oath he is diſcharged by a Decree, or Sentence from which there lies no Appeal, the Sentence or Decree will be inſtead of an Acquittance[f].

[e] Jusjurandum locò ſolutionis cedit. *l.* 27. *ff. de jurejur.* Eſt acceptilationi ſimile. *l.* 40. *eod.* See the tenth and eleventh Articles of the ſixth Section of Proofs.

[f] Res

[f] Res judicata dicitur, quæ finem controverſiarum pronuntiatione judicis accipit. Quod vel condemnatione, vel abſolutione contingit. *l. 1. ff. de re jud.*

VI.

6. If the thing that is due periſhes, the Debtor is acquitted.

If the thing that was due chances to periſh without the fault of the Debtor, the debt is acquitted. Thus, for example, if the thing ſold periſhes in the hands of the Seller who was not in fault that it was not delivered, he is free from his Obligation [g]. But this Rule is not to be underſtood of thoſe kinds of things which being lent are paid back in Kind and not in Specie, ſuch as Money, Corn, Wine, and other things of the like nature. For thoſe who borrow Things of this kind, are not bound to reſtore the ſame individual Thing which they have borrowed, but they are indebted for as much of the ſame Kind [h].

[g] Naturaliter (reſolvitur obligatio) cùm res in ſtipulationem deducta, ſine culpa promiſſoris, in rebus humanis eſſe deſiit. *l. 107. ff. de ſol.*

Si Stichus certo die dari promiſſus ante diem moriatur, non tenetur promiſſor. *l. 33. ff. de verb. obl. l. 23. eod. l. 5. ff. de reb. cred.* See the ſecond Article of the ſeventh Section of the Contract of Sale.

[h] *See the fourth Article of the firſt Section of the Loan of Money.*

If the Debtor owed one of two Things, and one of the two happens to periſh, he will continue Debtor of that which remains. Concerning which, See the ſeventh Article of the ſeventh Section of the Contract of Sale. *V. l. 95. ff. de ſolut.*

VII.

7. If the Creditor ſucceeds to the Surety, or the Surety to the Creditor.

If the Creditor ſucceeds as Heir to him who was Surety for his Debtor, or the Surety ſucceed to the Creditor, the Obligation of the Surety is annulled; but the Debtor nevertheleſs remains ſtill obliged. For the Surety's Obligation, which is extinguiſhed by this change, was only acceſſory to the principal Obligation [i]. And if there were more Debtors, or more Creditors for one and the ſame Sum, and if one of the Debtors ſhould ſucceed to one of the Creditors, or one of the Creditors to one of the Debtors; the confuſion which would be made in the perſon of the ſaid Heir being limited to one portion of the debt, would make no manner of change with reſpect to the others.

[i] Inter creditorem & adpromiſſores confuſione facta, reus non liberatur. *l. 42. ff. de ſolut.* See the eighth and ninth Articles of the fifth Section of Cautions or Sureties.

VIII.

8. Conſignment of the debt, in caſe the Creditor refuſes his payment.

When a Debtor, offering to pay all he owes, and in the place where he ought to pay it, the Creditor refuſes to receive it, it is lawful for the Debtor to conſign the Money: And if the conſignment is made according to form, it will be held as a payment of the debt, and will put a ſtop to the Rent, or Intereſt, if it is a Debt that bears Intereſt [k].

[k] Obligatione totius debitæ pecuniæ ſolemniter facta, liberationem contingere manifeſtum eſt. Sed ita demùm oblatio debiti liberationem parit, ſi eo loco quo debetur ſolutio fuerit celebrata. *l. 9. C. de ſolut.* Acceptam mutuò ſortem cum uſuris licitis creditoribus poſt conteſtationem offeras, ac ſi non ſuſcipiant, conſignatam in publico depone, ut curſus legitimarum uſurarum inhibeatur. In hoc autem caſu publicum intelligi oportet, vel ſacratiſſimas ædes, vel ubi competens judex ſuper ea re aditus deponi eas diſpoſuerit. Quo ſubſecuto, etiam periculo debitor liberabitur, & jus pignorum tolletur. *l. 19. C. de uſur.*

Seeing the Debtor is not permitted to conſign the debt, unleſs it appear that the Creditor has refuſed to receive payment of it, and ſeeing it may happen that the Creditor may have ſome juſt cauſe to refuſe it; the Debtor cannot ſafely conſign the debt, unleſs he does it by Order of the Court.

IX.

9. One cannot pay one thing for another.

Payments ought to be made of that which is due, and the debtor cannot, againſt the will of his Creditor, pay him another thing than what he owes, although the value of what he ſhould offer to give were equal, or even ſhould exceed the value of the thing due. Thus he who owes Money, cannot give in payment Lands or Houſes, or Debts, unleſs the Creditor conſent to it [m].

[m] Aliud pro alio invito creditori ſolvi non poteſt. *l. 2. §. 1. in f. ff. de reb. cred.* Eum à quo mutuam ſumpſiſti pecuniam, in ſolutum nolentem ſuſcipere nomen debitoris tui, compelli juris ratio non permittit, *l. 16. C. de ſolut.*

Manifeſti juris eſt, tam alio pro debitore ſolvente, quàm rebus pro numerata pecunia, conſentiente creditore, datis, tolli paratam obligationem. *l. 17. C. eod.*

By the third chapter of the fourth Novel, the Emperor Juſtinian *ordained, that Debtors who owed Sums of Money, and had only Lands or Houſes for which they could find no Purchaſers, ſhould be admitted to give in payment Houſes or Lands at a reaſonable valuation, with the Warranty which they were able to give, leaving to their Creditors the moſt valuable Houſes and Lands which they had. This Law was founded on a Motive of Humanity towards the Debtors, and even on the Intereſt of the Creditors themſelves, who could not hinder their Debtors, when reduced to the laſt neceſſity, from being admitted to ſurrender their Lands and Houſes for the payment of their Creditors. But the difficulties and inconveniencies that attended the execution of this Law brought it ſoon into diſuſe: and it were to be wiſhed that proviſion were made in this matter, as well as againſt the many abuſes committed in the Seizure and Sale of the Eſtates of Debtors.*

X.

10. A Work which ought to be made by the hand of a certain Workman.

Seeing Undertakers and Artiſans are Debtors for the Works which they undertake to make, and that there are Works of ſuch a nature, that it is of importance

importance to have them made by the hand of the Undertaker or Workman himſelf who undertook them; thoſe who are obliged to make with their own hand Works of this nature, cannot diſcharge themſelves of their Obligation by delivering the Work of another perſon[n].

[n] Inter artifices longa differentia eſt & ingenii, & naturæ, & doctrinæ, & inſtitutionis. Ideo ſi *navem à ſe fabricandam* quis promiſerit, *vel inſulam ædificandam, foſſamve faciendam*, & hoc ſpecialiter actum eſt, *ut ſuus operis id perficiat*, fidejuſſor ædificans, vel foſſam fodiens, non conſenticnte ſtipulatore, non liberabit reum. *l.* 31. *ff. de ſolut.* See the ninth Article.

XI.

11. The Ceſſion of Goods makes a payment in another thing than what was due.

The Debtors who are allowed to ſurrender their Goods for the ſatisfaction of their Creditors, give in payment another thing than what they owe. And this is likewiſe another manner of Payment, which ſhall be ſpoken to in its proper place[o].

[o] *See the Title of the Ceſſion of Goods.*

XII.

12. If one gives in payment of a Sum of Money, another thing than Money, it is a Sale.

If a Creditor of a Sum of Money ſhould conſent to take in payment Houſes, Lands, or other thing, it would be a Sale, of which the Sum that is due would make the Price. Thus the Debtor would remain Guarantee againſt all Evictions, and he would be diſcharged from the debt, only on condition of his warranting the poſſeſſion of the Thing to the Creditor, and the Payment would be altogether without effect if the Creditor ſhould be evicted of the Eſtate which he had received in payment[p], unleſs it had been otherwiſe agreed between the parties. And as the diminutions which might happen to the Thing given in payment would fall upon the Creditor, ſo likewiſe he would reap the profit of all that might render the Thing better or more valuable[q].

[p] Si quis aliam rem pro alia volenti ſolverit, & evicta fuerit (res) manet priſtina obligatio. *l.* 46. *ff. de ſolut. V. l.* 24. *ff. de pign. act.*

[q] Cùm pro pecunia quam mutuò acceperas, ſecundùm placitum Evandro te fundum dediſſe profitearis: ejus induſtriam, vel eventum meliorem tibi, non ipſi prodeſſe, contrarium non poſtulaturus, ſi minoris diſtraxiſſet, non juſtè petis. *l.* 24. *C. de ſolut.*

XIII.

13. If a part of the Land given in payment, is evicted from the Creditor.

If in the caſe of the preceding Article, the Creditor having taken Lands in payment, a part of them were evicted from him, he might oblige the Debtor to take back the reſt. For it might ſo happen that becauſe of the Eviction of that part, the reſt of the Land might be a burden to him, and that he took the Land in payment, only that he might have it whole and entire[r].

[r] Si quis aliam rem pro alia volenti ſolverit, & evicta fuerit (res) manet priſtina obligatio. Et ſi pro parte fuerit evicta, tamen pro ſolido durat obligatio. Nam non accepiſſet re integra creditor, niſi pro ſolido ejus fieret. *l.* 46. *ff. de ſolut.*

XIV.

14. A Payment made in a Species of Money that is juſt going to be cried down.

Payments of Money ought to be made in Species which are neither cried down, nor ſuſpected[s]. But if the Creditor having delayed to receive his payment, the Money ſhould chance to be cried down, before the Debtor had actually made a Tender of the Money to his Creditor, the loſs which would be occaſioned by crying down the Species that remained ſtill in the hands of the Debtor, would fall upon the Debtor. For he was ſtill Maſter of them while they were in his hands[t].

[s] Non eſſe cogendum (creditorem) in aliam formam nummos accipere ſi ex ea re damnum aliquod paſſurus ſit. *l.* 99. *ff. de ſolut.*

[t] Creditor oblatam à debitore pecuniam, ut aliâ die acceptaturus, diſtulit; mox pecunia qua illa reſpublica utebatur, quaſi æroſa, juſſu prætidis ſublata eſt: item pupillaris pecunia, ut poſſit idoneis nominibus credi ſervata, ira interempta eſt. Quæſitum eſt cujus detrimentum eſſet? reſpondi ſecundùm ea quæ proponerentur, nec creditoris, nec tutoris detrimentum eſſe. *l.* 102. *eod.*

SECT. III.

Who may make a Payment, or receive it.

The CONTENTS.

1. *Perſons who are jointly bound for the ſame debt, and Sureties, may pay for the Debtor.*
2. *Any perſon may pay for another.*
3. *Of the Debtor who with the Money of another perſon pays their common Creditor his own debt.*
4. *The Attorney of a perſon may make a Payment, and receive it.*
5. *Payment to him who has not power to give an Acquittance.*
6. *Tutors and Curators may make and receive Payments.*
7. *Payment to one of more Creditors, each of whom has a right to receive the whole.*
8. *One of many Heirs can receive only his own portion.*

9. *Payment made to one who lies under an Accuſation of a Crime.*

I.

1. *Perſons who are jointly bound for the ſame debt, and Sureties, may pay for the Debtor.*

PErſons who have intereſt that a debt be acquitted, may pay it. Thus, thoſe who are jointly bound together each of them for the whole debt, may pay one for the other: Thus, Sureties may acquit what they are bound to pay for others. And the Payments which theſe perſons make, diſcharge the Debtors for whoſe behoof they make them, and annul their Obligation to the Creditor. But the ſaid Debtors remain obliged to him who acquits their debt [a].

[a] Si ex pluribus obligatis uni accepto feratur, non ipſe ſolus liberatur, ſed & hi qui ſecum obligantur. Nam cùm ex duobus, pluribuſque ejuſdem obligationis participibus uni accepto fertur, cæteri quoque liberantur: non quoniam ipſis acceptò latum eſt, ſed quoniam velut ſolviſſe videtur is qui acceptilatione ſolutus eſt. *l.* 16. *ff. de acceptil.*

Creditor prohiberi non poteſt exigere debitum, cùm ſint duo rei promittendi ejuſdem pecuniæ, à quo velit: & ideò ſi probaveris te conventum in ſolidum exolviſſe, rector provinciæ juvare te adversùs eum cum quo communiter mutuam pecuniam accepiſti non cunctabitur. *l.* 2. *C. de duob. reis.*

II.

2. *Any perſon may pay for another.*

Payment may be made not only by a perſon who is intereſted with the Debtor, but alſo by other perſons who have no concern in the debt. And he for whom another has paid is acquitted, whether he knows, or is ignorant of the Payment, and even altho' he ſhould not agree to it. For the Creditor may receive that which is due to him: and he who pays for another, may do that favour, either to the Creditor, or to the Debtor, or may have other juſt cauſes for doing it [b].

[b] Solvendo quiſque pro alio, licet invito & ignorante, liberat eum. *l.* 39. *ff. de neg. geſt.*

Repetitio nulla eſt ab eo qui ſuum recepit: tametſi ab alio quam vero debitore ſolutum eſt. *l.* 44. *ff. de cond. indeb.*

Solutione pro nobis, & inviti & ignorantes liberari poſſumus. *l.* 23. *ff. de ſolut.*

Solvere pro ignorante & invito cuique licet: cùm ſit jure civili conſtitutum, licere etiam ignorantis invitique meliorem conditionem facere. *l.* 53. *eod. l.* 17. *C. eod.*

Altho' it be permitted that one perſon may pay for another, yet this Rule is to be underſtood of debts that are legally due, and of perſons who acquit them with an honeſt and fair intention. For it is not allowed, that one under pretext of paying for another, ſhould make payment of a debt which the debtor pretends he does not owe. And it is ſtill leſs allowable to pay in order to purchaſe litigious Rights, and to vex thoſe who are pretended to be the Debtors thereof. The Emperor Anaſtaſius *prohibited this Commerce by a Law, which is the* 22[d] Cod. de mand. *And ſeeing litigious Rights are never aſſigned over to others except for leſſer Sums than thoſe which are pretended to be due, he ordained that the Aſſignee ſhould receive only the ſame Sum which he had really and truly paid. But becauſe many perſons eluded theſe Prohibitions, by making mixed Conveyances, which conſiſted of a Sale of one part for a certain price, and of a Donation of the Overplus;* Juſtinian *by another Law,* which is the twenty third of the ſame Title, *prohibited this mixture of Sale and Donation together, allowing thoſe Conveyances when they were made purely on the ſcore of Donation: and as for the others which ſhould happen to be made for a certain price, he left the Debtor at liberty to acquit them, by paying only the real price which the Purchaſer had diſburſed. But all theſe precautions not being ſufficient to hinder perſons from counterfeiting a Donation inſtead of a Sale, nor from mentioning in the Conveyance a greater price than what was actually paid, it was no difficult matter to elude theſe Laws. And beſides, there are many occaſions in which the Aſſignments of controverted debts may be lawful. For beſides the exceptions which this Law of* Anaſtaſius *makes of Aſſignments among Co-heirs in relation to the Rights of the Succeſſion, and in ſome other caſes where they who accept of ſuch Aſſignments are thereby obliged for ſome lawful intereſt; it may happen, and it often does happen, that a debt is rendered litigious by an unjuſt oppoſition from the Debtor. It may likewiſe ſo fall out, that a Creditor of a lawful debt, although it be doubtful and controverted, may not have any other Fund whereupon to ſubſiſt, or wherewithal to pay a Creditor: and in theſe and other the like caſes, the Aſſignments of conteſted Rights may not be altogether unjuſt. For which reaſon, the putting theſe Laws of* Anaſtaſius *and* Juſtinian *in execution, ought to be left to the diſcretion of the Judge, according to the quality of the Facts, and the circumſtances which may help him to judge whether the Aſſignments be juſt or unjuſt, and whether they ought to have their entire effect, or if the Debtor may be admitted to reimburſe the perſon to whom the Aſſignment is made of the Sum which he has actually paid to the Creditor, or even whether he who has accepted of the Aſſignment ought not to be puniſhed for it, if on his part there were any miſdemeanour which might deſerve it. It is becauſe of theſe different effects of the Aſſignments of Litigious Rights, that ſome Authors have been of opinion, that theſe Laws are not at preſent obſerved in* France, *becauſe they have ſeen that they have not been followed in many caſes, which were excepted for particular reaſons; whereas others are of opinion, that they are ſtill in force here, becauſe in reality there are many caſes where they are obſerved, and becauſe it is juſt to reſtrain the commerce of Aſſignments of Litigious Rights, on all occaſions wherever Equity may ſeem to demand it.* As to the Aſſignments of Litigious Rights, the Reader may conſult the Remarks at the end of the Preamble to the eighth Section of the Contract of Sale.

III.

3. *Of the Debtor who with the Money of another perſon pays their common Creditor his own debt.*

If a Debtor having given his Money to another perſon to pay the ſame for him to his Creditor, the ſaid third perſon being indebted to the ſame Creditor, gives him that Money in payment of what he himſelf owes him; this Payment would ſeem to be uſeleſs both for the one and the other of theſe Debtors. For he who carried the Money had no power to imploy it in the diſcharge of his own debt: and he who gave it is not diſcharged by a Payment that was not made for his account. Thus, whilſt things remained entire, and the effect of the ſaid Fraud could be repaired, the Payment would be rectified, and placed

to the account of him who had given the Money. But if the Creditor being ignorant of the knavery of him who carried the Money, had delivered him up his Bond, and had diſpoſed of the Money, there would remain nothing for him who gave the Money, except his Action againſt the perſon who had undertaken to deliver it to the Creditor. But if, on the contrary, in the ſame caſe the Creditor who had delivered up the Bond, had ſtill the Money in his hands, he could not keep it, no more than a thing that were ſtolen, which he would be obliged to reſtore to the Owner [c]. But he who had given the Money, could not oblige the Creditor to reſtore it, unleſs he procured the Bond to be given back to the Creditor, which he delivered up to the bearer of the Money, that all things might be in the ſame ſtate and condition they were in before the Payment. For otherwiſe he who ſent the Money by another, ought to impute to himſelf this conſequence of his imprudent choice of the perſon. And there would remain nothing to him but his Action againſt the perſon whom he had intruſted with the Money. But the bearer of the Money would be anſwerable to both the other perſons for Coſts and Damages, and be liable to the other Penalties which his knaviſh dealing might deſerve.

[c] Caſſius ait, ſi cui pecuniam dedi ut eam creditori meo ſolveret: ſi ſuo nomine dederit, neutrum liberari: me, quia non meo nomine data ſit: illum, quia alienam dederit. Cæterum mandati eum teneri. Sed ſi creditor eos nummos ſine dolo malo conſumpſiſſet, is qui ſuo nomine eos ſolviſſet, liberatur. Ne ſi aliter obſervaretur, creditor in lucro verſaretur. *l.* 17. *ff. de ſolut. v. l.* 94. *d. l.* §. 2. *V.* §. 6. *&* §. *ult. Inſt. de obl. quæ ex del.*

The Obligation of this Creditor to give back the Money, if it is in being, or to place it to the Accompt of the Owner of the Money, reſults from the terms of this Law, which ordains, that if the Money is no more in being, the perſon who delivered it to the Creditor be acquitted; from whence it follows, that it would be otherwiſe, if the Monies were ſtill extant in the hands of the Creditor. For in this caſe the Owner would claim them as a Thing ſtolen; the Laws reckoning in the number of Thefts falſe of ſuch a quality as this of the bearer of the Money, and giving to the Maſter of the Thing ſtolen, the Right of challenging it, in whoſe hands ſoever it is. V. d. §. 6. & §. ult. Inſt. de obl, quæ ex del. l. 54. ff. de furt. d. l. §. 1.

IV.

4. The Attorney of a perſon may make a payment, and receive it.

Thoſe who are appointed Agents, or Attorneys for others, may equally make payments for Debtors, and receive them for Creditors, if they have a ſpecial Power, or Letter of Attorney, impowering them ſo to do; or if they have a general Letter of Attorney, by which they are intruſted with the Adminiſtration of all the Affairs of any perſon: for their Act and Deed is the ſame as that of the perſons who have given them the charge of their concerns [d].

[d] Vero procuratori rectè ſolvitur. Verum autem accipere debemus cum cui mandatum eſt vel ſpecialiter, vel cui omnium negotiorum adminiſtratio mandata eſt. *l.* 12. *ff. de ſolut.* See the tenth Article of the third Section of Proxies.

V.

5. Payment to him who has not power to grieve. Acquittance.

If a Debtor pays to him whom he believed to be the Creditor's Factor or Attorney, and who was not ſo, the ſaid payment will not acquit him [e]. But if the Creditor who had given order to a perſon to receive the Money for him, revokes the ſaid Order, and the Debtor, being ignorant of the revocation, pays the Money to the ſaid perſon, the Payment will be good, and the Debtor will be thereby diſcharged; as on the contrary, the Payment would not avail the Debtor, if he had made it after he knew of the revocation [f].

[e] Procuratori qui ſe ultrò alienis negotiis offert ſolvendo, nemo liberabitur. *l.* 34. §. 4. *ff. de ſolut.*

Si quis offerenti ſe negotiis alienis bona fide ſolverit, quando liberetur? & ait Julianus, cùm dominus ratum habuerit, tunc liberari. *l.* 58. *eod.*

[f] Sed & ſi quis mandaverit ut Titio ſolvam, deinde vetuerit eum accipere, ſi ignorans prohibitum eum accipere ſolvam liberabor: ſed ſi ſciero, non liberabor. *l.* 12. §. 2. *eod. l.* 34. §. 3. *eod.*

VI.

6. Tutors and Curators may make and receive Payments.

Tutors, and Curators may make and receive Payments for perſons who are under their charge [g].

[g] Tutori rectè ſolvitur. *l.* 14. §. 1. *ff. de ſolut.* Curatori quoque furioſi rectè ſolvitur; item curatori ſibi non ſufficientis vel per ætatem vel per aliam juſtam cauſam: ſed & pupilli curatori rectè ſolvi conſtat. *d. l.* 14. §. 7. See the fourth Article of the ſecond Section of Tutors.

VII.

7. Payment to one of more Creditors, each of whom has a right to receive the Whole.

If a thing is due to two or more Creditors ſolidly, that is, in ſuch a manner that every one of them have full and ample Right to receive the Whole, the Payment that is made to one of them, will diſcharge the Debtor from all the others [h].

[h] Ex pluribus reis ſtipulandi, ſi unus acceptum fecerit, liberatio contingit in ſolidum. *l.* 13. § *ult. ff. de acceptil.* See the ſecond Section of Solidity among two, *&c.*

VIII.

8. One of many Heirs can receive

If there be no Solidity among ſeveral Creditors for one and the ſame Thing, that

only his own portion. that is, if each of them has not a right to receive the whole thing, but only his portion of it, ſuch as Co-heirs, none of them can receive the Whole for the others, unleſs they all conſent to it[i].

[i] *This is a conſequence of the preceding Article.* See the eleventh and twelfth Articles of the firſt Section of a Depoſitum. *V. l.* 81. §. 1. *ff. de ſolut.*

IX.

9. Payment made to one who lies under an Accuſation of a Crime. Perſons accuſed of Crimes which are liable to be puniſhed with Confiſcation of Goods, may before their Condemnation receive what is due to them, and pay what they owe. For otherwiſe innocent perſons who chance to be accuſed, would be unjuſtly deprived of the uſe of their Goods[l]. But this liberty of receiving and making Payments, ought to be underſtood in ſuch a manner, as that there be no fraud to elude the Confiſcation of Goods, and that the perſon who is accuſed give no Acquittance without receiving real Payment, and that he do not pay but what he lawfully owes[m].

[l] Reo criminis poſtulato, interim nihil prohibet rectè pecuniam à debitoribus ſolvi, alioquin plerique innocentium neceſſario ſumptu egebunt: ſed nec illud prohibitum videtur, ne à reo creditori ſolvatur. *l.* 41. *&* 42. *ff. de ſolut.*

[m] *V. l.* 15. *ff. de donat.*

SECT. IV.

Of the imputation of Payments.

The CONTENTS.

1. *The Debtor of ſeveral debts acquits whichſoever of them he pleaſes.*
2. *Payments are applied to the debts at the choice of the Debtor, and in his favour.*
3. *The payment is applied to the debt which it is moſt advantageous for the Debtor to acquit.*
4. *The Overplus of a Payment, after the diſcharge of one debt, is to be applied to the others.*
5. *A Payment is firſt applied to the diſcharge of the Intereſt.*
6. *And that even altho' the Acquittance ſhould mention both Principal and Intereſt.*
7. *How the price of what is pawned or mortgaged for ſeveral debts, is to be applied.*

I.

1. The Debtor of ſeveral debts, acquits whichſoever of them he pleaſes. IF a Debtor who owes to a Creditor different debts, hath a mind to pay one of them, he is at liberty to acquit whichſoever of them he pleaſes, and the Creditor cannot refuſe to receive payment of it[a]. For there is not any one of them which the Debtor may not acquit, although he pay nothing of all the other debts; provided he acquit intirely the debt which he offers to pay[b].

[a] Quoties quis debitor ex pluribus cauſis unum debitum ſolvit, eſt in arbitrio ſolventis dicere quod potius debitum voluerit ſolutum: & quod dixerit, id erit ſolutum. Poſſumus enim certam legem dicere ei quod ſolvimus. *l.* 1. *ff. de ſolut.*

[b] *See the ſixth Article of the firſt Section.*

II.

2. Payments are applied to the debts at the choice of the Debtor, and in his favour. If in the ſame caſe of a Debtor who owes ſeveral debts to one and the ſame Creditor, the ſaid Debtor makes a payment to him, without declaring at the ſame time which of the debts he has a mind to diſcharge, whether it be that he gives him a Sum of Money indefinitely in part of payment of what he owes him, or that there be a Compenſation of debts agreed on between the Creditor and Debtor, or in ſome other manner; the Debtor will have always the ſame liberty of applying the payment to whichſoever of the debts he has a mind to acquit. But if the Creditor were to apply the payment, he could apply it only to that debt which he himſelf would diſcharge in the firſt place, in caſe he were the Debtor. For Equity requires that he ſhould act in the Affair of his Debtor, as he would do in his own. And if, for example, in the caſe of two debts one of them were controverted, and the other clear, the Creditor could not apply the payment to the debt which is conteſted by the Debtor[c].

[c] Quoties verò non dicimus id quod ſolutum ſit, in arbitrio eſt accipientis cui potiùs debito acceptum ferat: dummodò in id conſtituat ſolutum, in quod ipſe, ſi deberet, eſſet ſoluturus, quoque debito ſe exoneraturus eſſet, ſi deberet, id eſt, in debitum quod non eſt in controverſia. *l.* 1. *ff. de ſolut.*

Æquiſſimum enim viſum eſt, creditorem ita agere rem debitoris, ut ſuam ageret. *d. l.* 1. In duriorem cauſam ſemper videtur (creditor) ſibi debere accepto ferre: ita enim & in ſuo conſtitueret nomine. *l.* 3. *eod.*

III.

3. The payment is applied to the debt which In all the caſes where a Debtor, owing ſeveral debts to one and the ſame Creditor, is found to have made ſeveral payments,

it is moſt advantageous for the Debtor to acquit.

payments, of which the application has not been made by the mutual conſent of the parties, and where it is neceſſary that it be regulated either by a Court of Juſtice, or by Arbitrators; the payments ought to be applied to the debts which lie heavieſt on the Debtor, and which it concerns him moſt to diſcharge. Thus, a Payment is applied rather to a debt of which the non-payment would expoſe the Debtor to ſome Penalty, and to Coſts and Damages, or in the payment of which his honour might be concerned, than to a debt of which the non-payment would not be attended with ſuch conſequences. Thus a Payment is applied to the diſcharge of a debt for which a Surety is bound, rather than to acquit what the Debtor is ſingly bound for without giving any Security; or to the diſcharge of what he owes in his own name, rather than of what he ſtands engaged for as Surety for another. Thus, a Payment is applied to a debt for which the Debtor has given Pawns and Mortgages, rather than to a debt due by a ſimple Bond, or Promiſe: rather to a debt of which the term is already come, than to one that is not yet due: or to an old debt, before a new one: and rather to a debt that is clear and liquid, than to one that is in diſpute: or to a pure and ſimple debt, before one that is conditional [d].

[d] Quod ſi fortè à neutro dictum ſit, in his quidem nominibus quæ diem vel conditionem habuerant, id videtur ſolutum cujus dies venit, & magis quod meo nomine, quàm quod pro alio fidejuſſoris nomine debeo: & potius quod cum pœna, quàm quod ſine pœna debetur: & potius quod ſatisdato, quam quod ſine ſatisdato debeo. *l.* 3. §. 1. *&* *l.* 4. *ff. de ſolut.*

Cùm ex pluribus cauſis debitor pecuniam ſolvit, utriuſque demonſtratione ceſſante, potior habebitur cauſa ejus pecuniæ quæ ſub infamia debetur: mox ejus quæ pœnam continet: tertio quæ ſub hypotheca, vel pignore contracta eſt: poſt hunc ordinem potior habebitur propria, quam aliena cauſa, veluti fidejuſſoris. Quod veteres ideò definierunt, quod veriſimile videretur diligentem debitorem admonitu ita negotium ſuum geſturum fuiſſe. Si nihil eorum interveniat, vetuſtior contractus ante ſolvetur. *l.* 97. *eod.* In debitum quod non eſt in controverſia. *l.* 1. *eod.* In his quæ præſenti die debentur, conſtat quoties indiſtincte quid ſolvitur, in graviorem cauſam videri ſolutum. Si autem nulla prægravaret, id eſt, ſi omnia nomina ſimilia fuerint, in antiquiorem. Gravior videtur quæ & ſub ſatisdatione videtur, quàm ea quæ pura eſt. *l.* 5. *eod.*

IV.

4. The Overplus of a Payment, after the diſcharge of one debt, is to be applied

When a payment made to a Creditor to whom ſeveral debts are due, exceeds the debt to which it ought to be applied, the Overplus ought to be applied to the diſcharge of the debt which follows, according to the order explained in the preceding Article, unleſs the Debtor makes another choice [e]. *to the others.*

[e] Si major pecunia numerata ſit quàm ratio ſingulorum (contractuum) expoſcit, nihilominùs primo contractu ſoluto qui potior erit, ſuperfluum ordini ſecundo, vel in totum, vel pro patre minuendo, videbitur datum. *l.* 97. *in f. ff. de ſolut.*

V.

5. A Payment is firſt applied to the diſcharge of the Intereſt.

If a Debtor makes a payment to diſcharge Debts which of their nature bear intereſt, ſuch as that of a Marriage Portion, or what is due by vertue of a Contract of Sale, or that the ſame be due by a Sentence of a Court of Juſtice, and the Payment be not ſufficient to acquit both the Principal and the Intereſt due thereon; the payment will be applied in the firſt place to the diſcharge of the Intereſt, and the Overplus to the diſcharge of a part of the Principal Sum [f].

[f] Quod generaliter conſtitutum eſt priùs in uſuras nummum ſolutum accepto ferendum, ad eas uſuras videtur pertinere quas debitor exolvere cogitur. *l.* 5. §. 2. *in f. ff. de ſolut.*

Si forte uſurarum rationem arbiter dotis recuperandæ habere debuerit, ita eſt computandum, ut prout quidque ad mulierem pervenit non ex univerſa ſumma decedat, ſed priùs in eam quantitatem quam uſurarum nomine mulierem conſequi oportebat: quod non eſt iniquum. *l.* 48. *eod.*

Quæri poterit an in vicem uſurarum hi fructus cedant, quæ in fideicommiſſis debentur. Et cùm exemplum pignorum ſequimur, id quod ex fructibus percipitur, primum in uſuras, mox, ſi quid ſuperfluum eſt, in ſortem debet imputari. *l.* 5. §. 21. *ff. ut in poſſeſſ. legat. vel fideic. ſerv. cauſ. eſſ. lic.*

VI.

6. And that even altho' the Acquittance ſhould mention both Principal and Intereſt.

If in the caſes of the foregoing Article the Creditor had given an Acquittance in general for Principal and Intereſt, the Payment would not be applied in an equal proportion to the diſcharge of a part of the Principal, and of a part of the Intereſt; but in the firſt place, all the Intereſt due would be cleared off, and the Remainder would be applied to the diſcharge of the Principal [g].

[g] Apud Marcellum quæritur, ſi quis ita caverit debitori *in ſortem & uſuras* ſe accipere, utrùm pro rata & ſorti & uſuris decedant, an verò priùs in uſuras, & ſi quid ſupereſt, in ſorte. Sed ego non dubito quin hæc cautio *in ſorte & in uſuras* priùs uſuras admittat: tunc deinde, ſi quid ſuperfuerit, in ſortem cedat. *l.* 5. §. *ult. ff. de ſolut.*

VII.

7. How the price of what is pawned or mortgaged for ſeveral debts, is to be applied.

When a Debtor obliging himſelf to a Creditor for ſeveral Cauſes at one and the ſame time, gives him Pawns or Mortgages which he engages for the ſecurity of all the debts; the Money which is raiſed by the Sale of the Pawns

or Mortgages, will be applied in an equal proportion to the diſcharge of every one of the debts. But if the debts were contracted at divers times upon the Security of the ſame Pawns and Mortgages, ſo as that the Debtor had mortgaged for the laſt debts what ſhould remain of the Pledge, after Payment of the firſt; the Monies ariſing from the Pledges would in this caſe be applied in the firſt place to the diſcharge of the debt of the oldeſt ſtanding[h]. And both in the one and the other caſe, if any Intereſt be due on account of the debt which is to be diſcharged by the payment, the ſame will be paid before any part thereof be applied to the diſcharge of the Principal[i].

[h] Cùm eodem tempore pignora duobus contractibus obligantur, pretium eorum pro modo pecuniæ cujuſque contractus creditor accepto facere debet. Nec in arbitrio ejus electio erit, cùm debitor pretium pignoris conſortioni ſubjecerit. Quòd ſi temporibus diſcretis ſuperfluum pignorum obligari placuit, priùs debitum pretio pignorum jure ſolvetur, ſecundùm ſuperfluo compenſabitur. *l.* 96. §. 3. *ff. de ſolut.*

[i] Cùm & ſortis nomine, & uſurarum aliquid debetur ab eo qui ſub pignoribus pecuniam debet quidquid ex venditione pignorum recipiatur, primùm uſuris quas jam tunc deberi conſtat, deinde ſi quid ſuperfluum eſt ſorti accepto ferendum eſt: nec audiendus eſt debitor, ſi cùm parum idoneum ſe eſſe ſciat, eligit quo nomine exonerari pignus ſuum malit. *l.* 35. *ff. de pign. act.* See the fifteenth Article of the third Section of Pawns and Mortgages.

TITLE II.

Of COMPENSATIONS.

The ſubject matter of this Title.

IT often happens that the ſame perſon is at the ſame time both Creditor and Debtor to another; as if an Executor is charged with a Legacy to a Legatee who was his Debtor: if two perſons are reciprocally indebted to one another for Money lent: if one has received and laid out Money for another: and two perſons may be mutually indebted to one another, ſo as that one of them alone may owe different debts, or likewiſe both of them. In theſe and other the like caſes, which are infinite in number, it is natural not to make ſo many payments as there are debts, ſo as for one of the two to pay to the other what he owes him, and to receive back again that which is due to him; but ſuch debts are compenſated, that is, every one retains in payment of what is due to him, that which he owes to the other, whether it be for the whole debt, if the Sums are equal, or by deducting a leſſer debt out of a greater. So that Compenſations are nothing elſe but two reciprocal Payments which are made at the ſame time, the Debtors giving to one another no other thing but their bare Acquittances, the debts being annulled for ſo much as ſhall be found to be acquitted by the Compenſation.

There are ſome debts which are not to be compenſated.

Altho' it ſeems natural that every Debtor who is on his part Creditor to the perſon to whom he is indebted may compenſate; yet the uſe of Compenſation is not extended indifferently to all ſorts of debts. For there are ſome debts which the Debtors are bound to acquit to thoſe who are in other reſpects indebted to them, without inſiſting on Compenſation, as ſhall be ſhewn in the ſecond Section.

[*By the Common Law of* England, *no Compenſation, or Stoppage, is allowed for Payment.*]

SECT. I.

Of the nature of Compenſations, and of their effect.

The CONTENTS.

1. *Definition of Compenſation.*
2. *Compenſation prevents the circuit of two Payments.*
3. *It takes place altho' the debts to be compenſated be not equal in quantity.*
4. *Compenſation hath its effect of it ſelf, and by virtue of the Law.*
5. *The Accompt ought to be ſtated year by year, that the Compenſations may be made at the time that the Sums became due.*
6. *The Judge may compenſate by vertue of his Office.*

I.

1. Definition of Compenſation.

COmpenſation is a reciprocal Acquittal of debts between two perſons who are indebted the one to the other[a].

[a] Compenſatio eſt debiti & crediti inter ſe contributio. *l.* 1. *ff. compenſ.*

II. The

II.

2. Compenſation prevents the circuit of two Payments.

The uſe of Compenſations is neceſſary to avoid the circuit of two Payments, which would happen, if each of the two perſons who compenſate ſhould be obliged firſt to pay what he owes, and then to receive back again what is due to himſelf. And it is natural, without fetching this compaſs, for every one to retain in payment of what is due to him that which he owes on his part. Thus every Compenſation implies two Payments[b].

[b] Compenſatio neceſſaria eſt: quia intereſt noſtra potiùs non ſolvere, quàm ſolutum petere. *l.* 3. *ff. de compenſ.*

Unuſquiſque creditorem ſuum eundemque debitorem petentem ſummovet, ſi paratus eſt compenſare. *l.* 2. *eod.*

Nec enim intereſſe ſolverit, an penſaverit. *l.* 4. *in f. ff. qui potior.*

III.

3. It takes place, altho' the debts to be compenſated be not equal in quantity.

Although the reciprocal debts be not equal ſo as to compenſate the whole, yet nevertheleſs the Compenſation takes place in a ſmaller debt againſt a greater, ſo that the greateſt debt is thereby acquitted for ſo much as the leaſt debt amounts to[c].

[c] Si quid invicem præſtare actorem oporteat, eo compenſato in reliquum is cum quo actum eſt debeat condemnari. §. 30. *inſt. de action.* Quoad concurrentes quantitates. *l.* 4. *C. de compenſ.*

IV.

4. Compenſation hath its effect of it ſelf, and by virtue of the Law.

Compenſation being natural, it has of it ſelf, and by virtue of the Law, its effect, although the perſons who have right to compenſate do not think of it, and even altho' both the one and the other ſhould be ignorant of the debts they have to compenſate. For each of them being at the ſame time both Creditor and Debtor to the other, theſe qualities are in Equity and in Truth confounded together, and annulled. Which hath this effect, that if, for example, two Heirs of two Inheritances, the Goods and Effects whereof were not yet fully known to them, ſhould be found in this quality of Heir to be reciprocally indebted to one another, the one for a Sum bearing Intereſt, and the other for a Sum bearing no Intereſt; the Intereſt would ceaſe to run, either in the whole, if the debts were equal, or to the amount of the leſſer debt, and that from the day that the leſt debt ſhould appear to be due[d].

[d] Placuit inter omnes id quod debetur ipſo jure compenſari. *l.* 21. *ff. de compenſ. l. ult. C. eod.*

Si conſtat pecuniam invicem deberi ipſo jure pro ſoluto compenſationem haberi oportet, ex eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejuſque ſolius quod amplius apud alterum eſt uſuræ debentur: ſi modo petitio earum ſubſiſtit. *l.* 4. *C. eod.*

Ejus quantitatis, cujus petitionem ratio compenſationis excludit, uſuras non poſſe repoſci manifeſtum eſt. *l.* 7. *C. de ſolut.*

Cùm alter alteri pecuniam ſine uſuris, alter uſurariam debet, conſtitutum eſt à Divo Severo, concurrentis apud utrumque quantitatis uſuras non eſſe præſtandas. *l.* 11. *ff. de compenſ.*

V.

5. The Accompt ought to be ſtated year by year, that the Compenſations may be made at the time that the Sums became due.

It follows from the preceding Rule, that between perſons who are reciprocally indebted to one another, as between a Tutor and his Minor, between Co-heirs, Co-partners, and others, if there be Sums owing which bear Intereſt, the Accompts and Computations ought to be ſtated year by year, and in ſuch a manner that the Compenſations and Deductions be made at the times that the Sums to be compenſated fall due, that the Intereſt may run, or ceaſe to run, according to the changes which the Compenſations and Deductions may make therein[e].

[e] Compenſationem haberi oportet ex eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejuſque ſolius quod ampliùs apud alterum eſt uſuræ debentur, ſi modò petitio earum ſubſiſtit. *l.* 4. *C. de compenſ. l.* 7. *C. de ſolut.*

VI.

6. The Judge may compenſate, by virtue of his Office.

Seeing Compenſation is made by the authority of the Law, it is in the power of the Judge, and it is likewiſe his duty, in the caſes where there are mutual demands between Parties, to compenſate of his own free motion, the reciprocal debts in which Compenſation may take place; whether it be that the Compenſation have this effect, as to acquit totally the Parties, or that after the Compenſation is made, one of the Parties ought to be condemned to pay ſome Overplus to the other.

[f] In bonæ fidei judiciis libera poteſtas permitti videtur judici ex bono & æquo æſtimandi quantùm actori reſtitui debeat. In quo & illud continetur, ut ſi quid invicem præſtare actorem oporteat, eo compenſato, in reliquum is cum quo actum eſt debeat condemnari. Sed & in ſtricti juris judiciis, ex reſcripto Divi Marci, oppoſita doli mali exceptione compenſatio inducebatur. Sed noſtra conſtitutio eaſdem compenſationes quæ aperto jure nituntur latiùs introduxit, ut actiones ipſo jure minuant, ſive in rem, ſive in perſonam, ſive alias quaſcunque. §. 30. *inſt. de action.*

SECT.

SECT. II.

Among what perſons Compenſation takes place, and in what debts.

The CONTENTS.

1. *One compenſates only in his own right.*
2. *To compenſate, it is neceſſary that the debts be clear and liquid.*
3. *And that there be no exception to annul the debt.*
4. *Debts which are not as yet become due, cannot be compenſated.*
5. *There is no Compenſation againſt Debts of Publick Taxes.*
6. *There is no Compenſation in a Thing depoſited, or lent.*
7. *Compenſation in Crimes and Offences, in what reſpect it takes place, and what not.*
8. *If Compenſation is made of two debts equal in the Sums, but unequal in other reſpects.*
9. *One can compenſate only that which may be given in payment.*

I.

1. *One compenſates only in his own right.*

COmpenſation can only be made between perſons who have in their own names the double quality of Creditor and Debtor: And if a Debtor exerciſes againſt his Creditor a Right which is not his own, as a Tutor does who demands a debt due to his Minor; or an Attorney who ſues the debtor of the perſon who has given him a Power ſo to do; there will be no Compenſation made of what the ſaid Tutor or Attorney may owe in their own names to the ſaid Debtors[a].

[a] Id quod pupillorum nomine debetur, ſi tutor petat, non poſſe compenſationem objici ejus pecuniæ, quam ipſe tutor ſuo nomine adverſario debet. *l.* 23. *ff. de compenſ.*

II.

2. *To compenſate, it is neceſſary that the debts be clear and liquid.*

It is not enough to make a Compenſation, that there be a debt on the one ſide and the other, but it is moreover neceſſary that both the debts be clear and liquid, that is, certain and not liable to diſpute. Thus one cannot compenſate with a clear and liquid debt, a debt that is litigious, nor a pretenſion that is not ſettled. But it depends on the prudence of the Judge, to diſcern which debt is clear and liquid, and which is not. And as he ought not to defer giving Sentence for a Debt that is clear and evident, becauſe of a demand of a Compenſation which would require a long diſcuſſion, and that ſuch Demand ought to be reſerved to be judged afterwards; ſo neither ought he to refuſe a ſhort delay for ſuch a diſcuſſion, if it can be done eaſily, and in a ſhort time[b].

[b] Ita compenſationes objici jubemus, ſi cauſa ex qua compenſatur liquida ſit, & non multis ambagibus innodata: ſed poſſit judici facilem exitum ſui præſtare. *l. ult. C. de compenſ.*

Hoc itaque judices obſervent, & non proclivi-ores ad admittendas compenſationes exiſtant: nec molli animo eas ſuſcipiant, ſed jure ſtricto utentes, ſi invenerint eas majorem & ampliorem expoſcere indaginem, eas quidem alii judicio reſervent: litem autem priſtinam jam pene expeditam ſententiâ terminali componant. *d. l. ult.*

III.

3. *And that there be no exception to annul the debt.*

We muſt reckon among the debts which do not enter into Compenſation, thoſe which, altho' clear and evident in themſelves, may be annulled by ſome Exception which the Debtor may have againſt them[c]. Thus he who is indebted to a Minor, cannot compenſate what the ſaid Minor owes him by virtue of an Obligation againſt which he may be relieved.

[c] Quæcumque per exceptionem perimi poſſunt, in compenſationem non veniunt. *l.* 14. *ff. de compenſ.*

IV.

4. *Debts which are not as yet become due, cannot be compenſated.*

The debts of which the term of payment is not yet come, are not compenſated with thoſe which are due without any term, or of which the term is already come[d]. And conditional debts, the effect whereof depends on the event of a condition, cannot be compenſated till after the condition has happened.

[d] Quod in diem debetur non compenſabitur antequàm dies venit, quamquàm dari oporteat. *l.* 7. *ff. de compenſ.*

V.

5. *There is no Compenſation againſt debts of Publick Taxes.*

Thoſe who are indebted on account of the Publick Taxes, ſuch as the Land-Tax, Exciſe, Cuſtoms, and other Subſidies, cannot compenſate with theſe ſorts of Charges that which the Prince may owe them on other accounts. For the nature and uſe of theſe Contributions is ſuch, that nothing can retard the payment of them. And much leſs can they compenſate that which may be due to them from the perſons who are imployed in collecting the Taxes. Thus, a private perſon who is aſſeſſed to the Land-Tax, cannot compenſate the Sum at which he is aſſeſſed with what may be

be owing to him by the Collector. Thus, a Receiver of the Land-Tax cannot compenſate with the publick Monies which he has received, that which the Receiver General may be indebted to him. But the other debts which are not privileged, and which one owes to the Exchequer, may be compenſated with what the Exchequer owes to the ſame perſon. Thus, for Example, if in an Eſtate fallen to the Crown by Confiſcation, by default of Heirs, or by the death of an Alien, there be ſome of the Effects conſiſting in debts, the Debtors whereof are found to be likewiſe Creditors to the perſon to whom the Eſtate did belong, Compenſation of thoſe debts will be allowed [e].

[e] In ea quæ reipublicæ te debere fateris compenſari ea quæ invicem ab eadem tibi debentur, is cujus de ea re notio eſt, jubebit: ſi neque ex Kalendario, neque ex vectigalibus, neque ex frumenti vel olei publici pecunia, neque tributorum, neque alimentorum, neque ejus qui ſtatutis ſumptibus ſervit, neque fideicommiſſi civitatis debitor ſis. *l.* 3. *C. de compenſ. l.* 20. *ff. eod. l.* 46. §. 5. *ff. de jure fiſci.*

VI.

6. There is no Compenſation in a Thing depoſited, or lent.

The Depoſitary of a Thing, and he who has borrowed a Thing for uſe, cannot compenſate what they have by vertue of any of theſe Titles, with a debt which the Maſter of the Thing depoſited, or lent, may owe to them. And if two perſons had reciprocally Things belonging to another depoſited in their hands, there would be no Compenſation between them in this caſe, but each of them would be obliged to reſtore the Thing which had been depoſited in his hands [f].

[f] Exceptâ actione depoſiti, ſecundùm noſtram ſanctionem in qua nec compenſationi locum eſſe diſpoſuimus. *l. ult. in f. C. de compenſ.*

Si quis vel pecunias, vel res quaſdam per depoſitionis acceperit titulum, eas volenti ei qui depoſuit reddere, illicò modis omnibus compellatur: nullamque compenſationem, vel deductionem, vel doli exceptionem opponat. *l.* 11. *C. depoſ.*

Sed etſi ex utraque parte aliquid fuerit depoſitum, nec in hoc caſu compenſationis præpeditio oriatur: ſed depoſitæ quidem res, vel pecuniæ ab utraque parte quam celerrimè, ſine aliquo obſtaculo, reſtituantur. *d. l.*

Prætextu debiti, reſtitutio commodati non probabiliter recuſatur. *l. ult. C. de commod. V. l.* 18. §. *ult. ff. commod.* See the laſt Article of the third Section of a Depoſitum, and the thirteenth Article of the firſt Section of the Loan of Things to be reſtored in Specie.

VII.

7. Compenſation in Crimes and Offences, in what reſpect it takes place, and what not.

In Crimes and Offences one does not compenſate neither the Accuſations, nor the Puniſhments [g]. But when the matter relates only to Coſts and Damages, or to the Civil Intereſt of the Party, if the perſon accuſed be found to be a Creditor of the Accuſer's, he may compenſate [h].

[g] Non eſt ejuſmodi compenſatio admiſſa. *l.* 2. §. 4. *ff. ad leg. Jul. de adult.*

[h] Quoties ex maleficio oritur actio: ut putà ex cauſa furtiva, cæterorumque maleficiorum, ſi de ea pecuniarie agitur, compenſatio locum habet. *l.* 10. §. 2. *ff. de compenſ.*

VIII.

8. If Compenſation is made of two debts equal in the Sums, but unequal in other reſpects.

If one compenſates two debts, which, although equal in the Sums, are diſtinguiſhed by ſome difference which may be eſtimated; the ſame may be conſidered in making the Compenſation. Thus, for example, if he who was to pay a Sum of Money in a certain place where it was the Creditor's intereſt to have it paid, compenſates it in another place, and is by that means freed from the charges it would have coſt to have remitted the Money to the place where it was to have been paid; in making the Compenſation the value of the ſaid Remittance may be eſtimated [i].

[i] Pecuniam certo loco à Titio dari ſtipulatus ſum: is petit à me quam ei dabo pecuniam: quæro, an hoc quoque penſandum ſit, quanti mea interfuit certo hoc loco dari? Reſpondit, ſi Titius petit, eam quoque pecuniam quam certo loco dare promiſit, in compenſationem deduci oportet: ſed cum ſua cauſa, id eſt, ut ratio habeatur, quanti Titii interfuerit, eo loco quo convenerit, pecuniam dari. *l.* 15. *ff. de compenſ.*

IX.

9. One can compenſate only that which may be given in payment.

Since Compenſations are Payments [l], and that we cannot pay one thing for another againſt the will of the Creditor [m]; ſo neither can we compenſate any thing but what may be given in payment. Thus, an Heir or Executor who had been charged by the Teſtator to give certain Lands to a Legatee, could not oblige him to compenſate with the ſaid Lands a Sum of Money which the ſaid Legatee might happen to owe him. Thus, he who ſhould owe a Ground-Rent that could not be redeemed, could not extinguiſh it by a Compenſation of a Sum of Money which the Creditor of the Ground-Rent might be indebted to him. But he could only compenſate the Arrears of the ſaid Rent that ſhould be due.

[l] Nec intereſſe ſolverit, an penſaverit. *l.* 4. *in f. ff. qui pot.* See the ſecond Article of the firſt Section.

[m] Aliud pro alio invito creditori ſolvi non poteſt. *l.* 2. §. 1. *in f. ff. de reb. cred.* See the ninth Article of the ſecond Section of Payments.

TITLE

TITLE III.

Of NOVATIONS.

The ſubject matter of this Title.

IT has been remarked in the Preamble of this Book, that we may annul or diminiſh Engagements, by ſubſtituting a ſecond Engagement in the place of a former: ſo as that there be only the ſecond Engagement which ſubſiſts, the former being annulled; and this may happen two ways. One, without any change of the perſons, by changing only the nature of the Obligation: And the other, by a change of the Debtor; whether it be that the firſt Obligation ſubſiſts, the ſecond Debtor charging himſelf therewith inſtead of the former, who is diſcharged from it, or that the new Debtor makes a new Obligation. Thus, for an example of the firſt of theſe two ways, if an Executor who is charged with a Legacy agrees with the Legatee to give him a Bond as for Money lent, amounting to the ſame Sum with that which has been bequeathed to him, without making any mention of the Legacy in the Bond, and the ſaid Legatee gives the Executor an Acquittance for the Legacy; in this tranſaction there will be no change of the perſons, but only a change in the nature of the Engagement, an Obligation for Money lent being ſubſtituted in the place of a Legacy due by a Teſtament. And it is this firſt way which we call Novation, and which ſhall be the ſubject matter of this Title. Thus, for an example of the ſecond way by the change of the perſon of the Debtor, if he who is indebted for Money lent, ſubſtitutes in his place another Debtor, who obliges himſelf for the ſame Sum to the Creditor, ſo that the firſt Debtor be diſcharged, the firſt Engagement will be annulled in regard of the firſt Debtor, who will be no longer bound for the Money, and he who is ſubſtituted, will become Debtor in the place of the other. And it is this ſecond way which is called Delegation, whether the new Debtor take upon him to acquit the firſt Obligation which is ſuffered to remain in force, or whether the firſt Obligation is ſuppreſſed, and the new Debtor obliges himſelf by ſome other Title; but always in ſuch a manner that the Engagement of the firſt Debtor be annulled by that of the new Debtor, who ſucceeds in his place: and this ſhall be the ſubject matter of the following Title.

[*This method of annulling prior Engagements, by ſubſtituting new ones in their room, is in the ancient Books of the Common Law of* England *deſcribed by the ſame name of Novation.* Bracton lib. 3. cap. 2. num. 13. Fleta lib. 2. cap. 60.]

SECT. I.

Of the nature of Novation, and of its effect.

The CONTENTS.

1. *Definition of Novation.*
2. *Novation is not preſumed, if it do not appear.*
3. *The alterations made in a former Obligation, do not innovate it.*
4. *Novation of ſeveral debts into one.*
5. *The Novation annuls the Mortgages, and other Acceſſories of the Obligation.*

I.

NOvation is the change which the Creditor and Debtor make, who in the place of one debt ſubſtitute another; ſo that the firſt Obligation ſubſiſts no longer, and the Debtor remains obliged only by the ſecond[a]. Thus, for example, if after a Contract of Sale, the Price not being yet paid, the Seller takes a Bond from the Buyer as for Money lent, for the ſame Sum which the Price of the Sale amounts to, ſo as that the Contract of Sale be diſcharged, and no reſervation made thereof in the new Obligation, the Seller will have innovated his debt.

1. *Definition of Novation.*

[a] Novatio eſt prioris debiti in aliam obligationem, vel civilem, vel naturalem transfuſio, atque tranſlatio. Hoc eſt cùm ex præcedenti cauſa ita nova conſtituatur, ut prior perimatur. Novatio enim à novo nomen accipit, & à nova obligatione. *l.* 1. *ff. de novat. & deleg.*

II.

There is never any Novation produced by the bare effect of a ſecond Obligation, unleſs it appear that the Creditor and Debtor have had an intention to extinguiſh the firſt. For otherwiſe both Obligations will ſubſiſt[b].

2. *Novation is not preſumed, if it do not appear.*

[b] Novatio ità demum fit ſi hoc agatur, ut novetur obligatio. Cæterùm ſi non hoc agatur, duæ erunt obligationes. *l.* 2. *in f. ff. de nov. & deleg.*

Niſi ipſi ſpecialiter remiſerint quidem priorem obligationem, & hoc expreſſerint, quod ſecundam magis pro anterioribus elegerint. *l. ult. C. eod.* See the following Article.

III.

3. *The alterations made in a former Obligation, do not innovate it.*

If the Creditor and Debtor agree to make ſome changes in a former Obligation, whether it be by adding to it a Mortgage, a Surety, or ſome other Security, or by taking the ſame away: whether it be by augmenting or diminiſhing the debt, or by fixing a longer or ſhorter term of payment, or by making the debt conditional if it was pure and ſimple, or pure and ſimple if it was conditional; all theſe changes, and others of the like nature, do not make any Novation, becauſe they do not extinguiſh the firſt debt, unleſs it were expreſſly ſaid that it ſhould be null. And the firſt Obligation ſubſiſts, although it be not particularly mentioned that it is reſerved, or that the ſaid changes are made without an intention to innovate[c].

[c] Novationum nocentia corrigentes volumina, & veteris juris ambiguitates reſecantes, ſancimus, ſi quis vel aliam perſonam adhibuerit, vel mutaverit, vel pignus acceperit, vel quantitatem augendam, vel minuendam eſſe crediderit, vel conditionem, ſeu tempus addiderit vel detraxerit, vel cautionem minorem acceperit, vel aliquid fecerit ex quo veteris juris conditores introducebant novationes: nihil penitùs prioris cautelæ innovari. Sed anteriora ſtare & poſteriora incrementum illis accedere: niſi ipſi ſpecialiter remiſerint quidem priorem obligationem, & hoc expreſſerint quòd ſecundam magis pro anterioribus elegerint. Et generaliter definimus: voluntate ſolùm eſſe, non lege novandum. Etſi non verbis exprimatur, ut ſine Novatione (quod ſolito vocabulo, ἀνευ καινότητος Græci dicunt,) cauſa procedat. Hoc enim naturalibus ineſſe rebus volumus, & non verbis extrinſecùs ſupervenire. *l. ult. C. de novat. & deleg.*

Si ità fuero ſtipulatus, *Quanto minùs à Titio debitore exegiſſem, tantum fidejubes?* Non fit novatio: quia non hoc agitur, ut novetur. *l. 6. ff. eod.*

IV.

4. *Novation of ſeveral debts into one.*

One may innovate ſeveral debts by reducing 'em into one ſingle debt, which may comprehend and extinguiſh all the others[d]. Thus he to whom ſeveral debts are due for ſeveral cauſes, may reduce to one Sum all that is due to him, and take one ſingle Bond for the ſame as for Money lent, which Bond may comprehend all the other debts, and annul them.

[d] In ſumma admonendi ſumus, nihil vetare una ſtipulatione plures obligationes novari. *l. ult.* §. 2. *ff. de novat. & deleg.*

V.

5. *The Novation annuls the Mortgages, and other Acceſſories of the Obligation.*

Seeing the effect of Novation is to annul the former Obligation; the Mortgages, the Sureties, and the other Acceſſories of the firſt Obligation do not ſubſiſt any longer; and the Intereſt, if the ſaid Obligation carried any, ceaſes to run[e].

[e] Ut prior perimatur. *l. 1. ff. de novat.* See the firſt Article.

Novatione legitimè factâ liberantur hypothecæ & pignus, uſuræ non currunt. *l. 18. eod.*

SECT. II.

What perſons have power to make Novations, and of what debts.

The CONTENTS.

1. *Who may innovate.*
2. *A Tutor may innovate for the advantage of his Minor.*
3. *An Attorney may innovate, if he has a Warrant ſo to do.*
4. *Any one of the Creditors who has power to receive payment, may innovate.*
5. *Novation by another perſon than the Debtor.*
6. *All debts whatſoever may be innovated.*

I.

1. *Who may innovate.*

ALL perſons who are capable of contracting, may innovate both what they owe, and what is owing to them. And thoſe who cannot oblige themſelves, ſuch as Prodigals who are interdicted, cannot make any Novation, unleſs thereby they better their condition[a].

[a] Cui bonis inderdictum eſt novare obligationem ſuam non poteſt, niſi meliorem ſuam conditionem fecerit. *l. 3. ff. de novat. & deleg.*

II.

2. *A Tutor may innovate for the advantage of his Minor.*

Tutors and Curators may make Novations for thoſe who are under their charge, provided it be for their advantage[b].

[b] Tutor (novare) poteſt, ſi hoc pupillo expediat. *l. 20. §. 1. ff. de novat. & deleg.* Agnatum furioſi, aut prodigi curatorem novandi jus habere minimè dubitandum eſt: ſi hoc furioſo vel prodigo expediat. *l. ult. §. 1. eod.*

III.

3. *An Attorney may innovate, if he has a Warrant ſo to do.*

Attorneys who have a Special Power to innovate, or who have a general Letter of Attorney impowering them to take care of all the Goods and all the Affairs of the perſon who conſtitutes them, may innovate for the ſaid perſon[c].

[c] Novare poſſumus, aut ipſi, ſi ſui juris ſumus: aut per alios qui voluntate noſtra ſtipulantur. *l. 20. ff. de novat.* Procurator omnium bonorum (novare poteſt.) *d. l.* §. 1.

IV. If

IV.

4. Any one of the Creditors who has power to receive payment, may innovate.

If two perſons are Creditors for the ſame debt ſolidly, that is, in ſuch a manner that each of them alone has right to demand it, and to diſcharge the Debtor, any one of them may innovate the debt [d].

[d] Si duo rei ſtipulandi ſint, an alter jus novandi habeat: & quid juris unuſquiſque ſibi acquiſierit? Ferè autem convenit, & uni rectè ſolvi: & unum judicium petentem totam rem in litem deducere: item unius acceptilatione perimi utriuſque obligationem. Ex quibus colligitur, unumquemque perinde ſibi acquiſiſſe, ac ſi ſolus ſtipulatus eſſet, excepto eo quòd etiam facto ejus, cum quo commune jus ſtipulantis eſt, amittere debitorem poteſt. Secundùm quæ, ſi unus ab aliquo ſtipuletur novatione quoque liberare eum ab altero poterit, cùm id ſpecialiter agit. *l.* 31. §. 1. *ff. de novat. & deleg.* See the ſeventh Article of the third Section of Payments, and the ſecond Section of the Solidity among two, *&c.*

V.

5. Novation by another perſon than the Debtor.

As a third perſon who is no ways intereſted with the Debtor may pay for him, ſo likewiſe he may innovate his debt without him, he obliging himſelf in the Debtor's place to the Creditor, with an intention to innovate the ſaid debt, and to annul it [e].

[e] Quod ego debeo, ſi alius promittat, liberare me poteſt, ſi novationis causâ hoc fiat. *l.* 8. §. 1. *ff. de novat.* Liberat me is, qui quod debeo promittit, etiam ſi nolim. *d. l.* 8. *in. f.* See the ſecond Article of the third Section of Payments.

VI.

6. All debts whatſoever may be innovated.

All ſorts of debts whatſoever without diſtinction may be innovated, in the ſame manner as they may be extinguiſhed by other ways which acquit, or annul them. Thus, one may innovate a debt which was ſubject to Reſtitution, or Reſciſſion, a Legacy, a debt due by a Tranſaction, or by a Sentence of Condemnation in a Court of Juſtice, and any other debt, from what cauſe ſoever it may proceed [f]. And the Novation ſubſiſts, although the new debt may not ſubſiſt; as if it were liable to be vacated, or that the debt ſubſiſting it ſhould prove to be uſeleſs, the new debtor being inſolvent. For theſe events would not make the firſt Obligation to revive, which was extinguiſhed by the Novation [g].

[f] Illud non intereſt qualis proceſſit obligatio, utrùm naturalis an civilis, an honoraria: & utrùm verbis, an re, an conſenſu. Qualiſcumque igitur obligatio ſit quæ præceſſit, novari verbis poteſt: dummodò ſequens obligatio aut civiliter teneat, aut naturaliter, ut putà ſi pupillus ſine tutoris auctoritate promiſerit. *l.* 1. §. 1. *ff. de novat.* Legata vel fideicommiſſa ſi in ſtipulationem fuerint deducta, & hoc actum ut novetur, fiet novatio. *l.* 8. §. 1. *eod.*

[g] *See the firſt Article of the firſt Section.*

TITLE IV.

Of DELEGATIONS.

The ſubject matter of this Title.

THE nature of Novations and Delegations, with the difference that is between them, has been explained in the Preamble of the foregoing Title. And it has been there obſerved, that Delegation may be made in two manners. For one may delegate ſo as that the Obligation of him who delegates or appoints another Debtor in his place, be annulled, and do not any longer ſubſiſt; as if it was a Bond which was cancelled, the new Debtor binding himſelf by another Obligation, either of the ſame nature, or of a different kind. And one may likewiſe ſo delegate, as that the firſt Obligation ſtill ſubſiſting, the firſt Debtor be diſcharged from it, and that there remain no other Debtor beſides the perſon who is delegated. And in both theſe manners of Delegation, it is always certain that the Obligation of the firſt Debtor is annulled, ſince he remains no longer bound, and the Delegation making a new Debtor, makes likewiſe for this reaſon a new Obligation.

We make here this remark, becauſe although this diſtinction of the two manners of Delegation be not expreſſly and preciſely marked in the Texts which are quoted upon the Articles of this Title, yet it is a natural conſequence of what they contain of the nature and effects of Delegation.

It follows from theſe Remarks on the nature of Novation, and that of Delegation, that all Delegations imply a Novation, ſince in the place of a former Obligation a new one is ſubſtituted, But every Novation does not imply a Delegation, ſeeing the Debtor may innovate his firſt Obligation by a new one, in which he may oblige himſelf alone, without ſubſtituting any other new Debtor in his ſtead.

[*What is here explained under the Title of Delegation, is by the antient Authors who treat of the Law of* England, *comprehended under the general name of Novation.* Bracton lib. 2. cap. 2. num. 13. Fleta lib. 2. cap. 60.]

The CONTENTS.

1. *Definition of Delegation.*
2. *Delegation requires the conſent of all parties concerned.*
3. *Difference between Aſſignment of a debt, and Delegation.*

4. *Another*

4. *Another difference.*
5. *Neither the Aſſignment of a debt, nor the Obligation of a third perſon for the Debtor, make a Delegation.*
6. *Delegation to the Creditor, or to another by his order.*
7. *Delegation is a kind of Novation.*
8. *The perſon delegated cannot revive the former Obligation.*
9. *The perſon delegated cannot make uſe of the exceptions which he had againſt him who delegated him.*

I.

1. *Definition of Delegation.*

DElegation is the change of one Debtor for another, when he who is indebted ſubſtitutes a third perſon who obliges himſelf in his ſtead to the Creditor; ſo that the firſt Debtor is acquitted, and his Obligation extinguiſhed, and the Creditor contents himſelf with the Obligation of the ſecond Debtor [a].

[a] Delegare eſt vice ſua alium reum dare creditori. *l.* 11. *de novat. & deleg.* Solvit qui reum delegat. *l.* 8. §. 3. *ff. ad Velleian.* Bonum nomen facit creditor qui admittit debitorem delegatum. *l.* 26. §. 2. *ff. mand.* See the ſeventh Article.

II.

2. *Delegation requires the conſent of all parties concerned.*

There is this difference between Novation and Delegation, that whereas a third perſon may innovate the debt of the Debtor without his conſent [b]; Delegation is not made but by the conſent both of the Debtor who delegates another in his place, of the perſon who is delegated, and of the Creditor who accepts the Delegation, and who contents himſelf with the new Debtor [c].

[b] *See the fifth Article of the ſecond Section of Novations.*

[c] Delegatio debiti niſi conſentiente & ſtipulante promittente debitore, jure perfici non poteſt. *l.* 1. *C. de novat. & deleg.*

III.

3. *Difference between Aſſignment of a debt, and Delegation.*

We muſt not confound Delegation with the Aſſignment which a Debtor makes to his Creditor of what is owing to him by another perſon. For whereas Delegation implies the will of him who obliges himſelf in the place of another, and acquits the firſt Debtor; the Aſſignment of a debt is as it were a Sale of what is owing by a third perſon, which may be made without his conſent, and it may be agreed that he who makes the Aſſignment ſhall remain obliged as before [d].

[d] Delegatio debiti, niſi conſentiente promittente debitore, jure perfici non poteſt. Nominis autem venditio & ignorante, vel invito eo adverſus quem actiones mandantur contrahi ſolet. *l.* 1. *C. de novat. & deleg.*

IV.

4. *Another difference.*

There is moreover this difference between the Aſſignment of a debt and Delegation, that he who makes an Aſſignment may receive the debt which he has aſſigned, if intimation thereof has not been made to the perſon who owes the debt that is aſſigned: And the knaviſh dealing of him who receives what he had made over to another perſon, does not hinder the Debtor who has paid him from being diſcharged from the debt. But after the Delegation, the perſon who is delegated in the place of another cannot acquit his Obligation but by paying the debt to the Creditor who has accepted it [e].

[e] Si delegatio non eſt interpoſita debitoris tui, ac propterea actiones apud te remanſerunt, quamvis creditori tuo adverſus eum ſolutionis cauſa mandaveris actiones: tamen antequàm lis conteſtetur, vel aliquid ex debito accipiat, vel debitori tuo denuntiaverit, exigere à debitore tuo debitam quantitatem non vetaris: & eo modo tui creditoris exactionem contra eum inhibere. *l.* 3. *C. de novat. & deleg.*

V.

5. *Neither the Aſſignment of a debt, nor the Obligation of a third perſon for the Debtor, make a Delegation.*

If a Debtor makes over to his Creditor that which a third perſon owes to him, or if the ſaid third perſon becomes bound for the ſaid Debtor to his Creditor, ſo as that both in the one and the other caſe the firſt Debtor remains obliged; it will be neither a Delegation, nor a Novation; but an additional Security which this Debtor, who remains ſtill obliged himſelf, will give to his Creditor, the firſt Obligation ſtill ſubſiſting [f].

[f] Si quis aliam perſonam adhibuerit, vel mutaverit——nihil penitus prioris cautelæ innovari: ſed anteriora ſtare, & poſteriora incrementum illis accedere. *l. ult. C de novat. & deleg.*

VI.

6. *Delegation to the Creditor, or to another by his order.*

The Creditor to whom his Debtor delegates another Debtor in his place, may either accept the Delegation himſelf in his own name, or give his order that it be accepted by another perſon. And in this ſecond caſe, the Delegation makes a change both of the Debtor, and of the Creditor [g].

[g] Delegare eſt vice ſua alium reum dare creditori, vel cui juſſerit. *l.* 11. *ff. de novat. & deleg.*

VII.

7. *Delegation is a kind of Novation.*

Delegation is a kind of Novation. For the firſt Obligation of the perſon who delegates is extinguiſhed by the Obligation of him who is delegated [h].

[h] Ex

[h] Ex contractu pecuniæ creditæ actio inefficax dirigitur, ſi delegatione perſonæ ritè facta, jure novationis vetuſtior contractus evanuit. *l.* 2. *C. de nov. & deleg.* Si delegatio non eſt interpoſita debitoris tui, ac propterea actiones apud te remanſerunt, &c. *l.* 3. *eod.* Quod ſi delegatione facta jure novationis tu liberatus es, &c. *d. l.* 3. See the firſt Article.

VIII.

8. *The perſon delegated cannot revive the former Obligation.*

He who is delegated by the Debtor being obliged himſelf to the Creditor, cannot revive the firſt Obligation, which is annulled by the Delegation, nor mortgage the Eſtate which the firſt Debtor had engaged. And the Creditor on his part has no longer any recourſe againſt the perſon who has delegated; although the new Debtor ſhould become inſolvent, or even although he had been inſolvent at the time of the Delegation. For one does not any more conſider the origine of the firſt debt, but only the ſecond which has annulled the firſt. Which is to be underſtood of the caſe of a true Delegation which has innovated the debt[1].

[1] Paulus reſpondit, ſi creditor à Sempronio novandi animo ſtipulatus eſſet, ità ut à primâ obligatione in univerſum diſcederetur: rurſùm eaſdem res à poſteriore debitore, ſine conſenſu prioris obligari non poſſe. *l.* 30. *ff. de novat. & deleg.*

Si delegatione factâ jure novationis tu liberatus es, fruſtra vereris ne eo quod quaſi à cliente ſuo non faciat exactionem, ad te periculum redundet: cùm per verborum obligationem, voluntate novationis interpoſita, à debito liberatus ſis. *l.* 3. *in f. C. eod.* Bonum nomen facit creditor qui admittit debitorem delegatum. *l.* 26. §. 2. *in f. ff. mand.*

IX.

9. *The perſon delegated cannot make uſe of the exceptions which he had againſt him who delegated him.*

In the ſame caſe of a true Delegation which has innovated the debt, if the perſon who is delegated had juſt exceptions againſt the firſt Debtor which he had not reſerved, he cannot make uſe of them againſt the Creditor, even although his exceptions ſhould be grounded on ſome Fraud of the perſon who has delegated him. For the firſt Obligation ſubſiſting no longer, the ſecond derives its nature from what is tranſacted in the Delegation between the perſon delegated and the Creditor, whoſe intereſt is altogether independent on what had preceded between his Debtor and the perſon who is delegated. Thus, for example, if he who is delegated was indebted to the perſon who delegated him only on the account of a Donation which he had made him; the perſon delegated cannot make uſe of the exceptions which Donors have againſt the Donees, ſuch as the Right of revoking the Donation becauſe of the ingratitude of the Donee, or of having ſome favour and indulgence in the payment of a Sum which was given as a meer Bounty. Thus, for another example, if the perſon delegated was indebted to him who delegated him by virtue of an Obligation againſt which he might have been relieved, having granted it during his Minority for Money which he borrowed and ſquandered away idly, he could have no relief againſt the Creditor, if at the time of the Delegation he was of age[1].

[1] Doli exceptio quæ poterat deleganti opponi, ceſſat in perſona creditoris cui quia delegatus eſt, & in cæteris ſimilibus exceptionibus. *l.* 19. *ff. de novat. & deleg.* (Qui) jam exceſſit ætatem viginti-quinque annorum, quamvis adhuc poſſit reſtitui adverſus priorem creditorem (delegatione exceptionem amittit.) Ideo autem denegantur exceptiones adverſus ſecundum creditorem, quia in privatis contractibus, & pactionibus non facilè ſcire potitor poteſt, quid inter eum qui delegatus eſt, & debitorem actum eſt: aut etiam ſi ſciat, diſſimulare debet nec curioſus videatur. Et ideò merito denegandum eſt adverſus eum exceptionem ex perſona debitoris. *d. l.* 19.

Si Titius donare mihi volens, delegatus à me creditori meo ſtipulanti ſpopondit, non habebit adverſus eum illam exceptionem, ut quatenus facere poteſt condemnetur. Nam adverſus me tali defenſione merito utebatur, quia donatum ab eo petebam: creditor autem debitum perſequitur. *l.* 33. *eod.* See the ſixth Article of the ſecond Section of Donations, and the ſecond Article of the third Section of the ſame Title.

TITLE V.

Of the CESSION of GOODS, and of DISCOMFITURE.

Connexion between theſe two matters.

THE Ceſſion of Goods, and Diſcomfiture, are two conſequences of the inſolvency of Debtors, whoſe Goods and Effects are not ſufficient to pay their Creditors. And it is becauſe of this connexion between theſe two matters, that they are here placed under one and the ſame Title. We ſhall find in the firſt Section what relates to the Ceſſion of Goods, and the matter of Diſcomfiture ſhall be treated of in the ſecond Section.

SECT.

SECT. I.

Of the Ceſſion of Goods.

The ſubject matter of this Section.

THE Ceſſion of Goods which ſhall be treated of in this Section, is a benefit which the Laws have granted to Debtors, that they may deliver their Bodies from Impriſonment, by ſurrendring and yielding up all their Goods and Effects to their Creditors.

It is to be remarked touching this matter, that whereas in the *Roman* Law the Ceſſion of Goods might be made not only in a Court of Juſtice, but alſo in private, either by the Debtor himſelf, or by ſome other perſon having authority from him[a]; the Ordinances of *France* have prohibited the receiving the Ceſſion of Goods otherwiſe than by the Debtor in perſon, before the Judge, in open Court, with the Formalities which they have preſcribed[b], that the Ceſſion of Goods may be attended with ſhame and confuſion, in order to reſtrain the too great facility and frequency of them. And altho' it might ſeem reaſonable to exempt from this diſgrace thoſe who are reduced to make a Ceſſion of their Goods by reaſon of loſſes happened to them without their fault, which ought to diſtinguiſh their condition from that of Debtors who are reduced to that ſtate by their own Knavery, or bad Conduct[c]; yet the Ordinance has not made this diſtinction, that there might be no gap left open for the encouragement of perſons to make a Ceſſion of their Goods.

[a] Bonis cedi non tantum in jure, ſed etiam extra jus poteſt, & per nuntium, vel per epiſtolam id declarari. *l. ult. ff. de ceſſ. bon.*

[b] *The Debtor in perſon, while the Court is ſitting, without a Sword, and bare-headed. Ordinance of* 1510. *Art.* 70. *and that of* 1490. *Art.* 34.

[c] Ubi enim locorum juſtum eſt, ut is qui in univerſum ex accidenti, non ſupina negligentia, res ſuas amiſiſſe traditus eſſet, denuò per vim ad ignominioſam vitam tranſponatur. *Novel.* 135. *in præfatione.*

Beſides the benefit of the Ceſſion of Goods, the Laws of *France* have granted to Debtors that of Reſpites or Delays of one year, or of five years, which the Ordinances impower the Judges to grant to Debtors, upon a Judicial enquiry into the reaſons they have to offer for deſiring the ſame, the Creditors being called to make their exceptions againſt it[d].

[d] *Ordinance of* Orleans, *Art.* 61.

The Reſpites in the *Roman* Law depended on the Creditors themſelves, who had it in their choice either to oblige the Debtor to make Ceſſion of his Eſtate, or to grant him a delay of five years. And it was by the plurality of voices among the Creditors that this choice was regulated, reckoning the plurality, not by the number of the Creditors, but by the ſtrength and force of their Credits; ſo that one ſingle Creditor, whoſe Credit was more than that of all the others, was Maſter of this choice[e]. And the Debtor was obliged to give Security, in order to obtain a delay[f].

[e] Majorem eſſe partem, pro modo debiti, non pro numero perſonarum placuit. *l.* 8. *ff. de pactis. Vid. l. ult. Cod. qui bon ced. poſſ.*

[f] *V. l.* 4. *C. de præcib. imp. offf.*

All Debtors are not received alike to make Ceſſion of their Goods, nor to have the benefit of a Reſpite; but there are many cauſes which may hinder their obtaining theſe Favours, as well on the part of the Debtor who is found to be unworthy of them, as on the part of the Creditor to whom this prejudice cannot be done, either becauſe of the privilege of his Debt, or for other cauſes. Thus, they do not allow the benefit of a Ceſſion of Goods to one who owes a Civil Intereſt adjudged for a Crime: Thus a Farmer who has enjoyed the Fruits of his Farm is not allowed this benefit: Thus, the Ceſſion of Goods does not take place againſt a Creditor who is poſſeſſed of a Pledge, and does not deprive him of the Security he has on the Thing which the Debtor had parted with for his advantage. Thus, the Cuſtoms in ſeveral parts of *France* have differently regulated many caſes in which the Reſpite, or Delay does not take place; as in a Depoſitum, in a Debt adjudged by a Sentence after hearing both parties, for Rents of Houſes, or of Farms, Penſions, Coſts taxed, a Sale in the publick Market, a Sale of Lands or Houſes, Alimony, Medicines, Funeral Charges, the Wife's Marriage Portion demanded by the Huſband, or the Wife's Jointure demanded by the Widow, Arrears of Rents, which ſome Cuſtoms reſtrain to Ground-Rents, Salaries and Wages of Servants and Day-Labourers, debts owing to poor perſons who cannot conveniently lie out of their Money, debts due to Minors, contracted during their Minority, Monies remaining in the hands of perſons who have been intruſted with the Adminiſtration

ſtration of Goods belonging to the Church, or to the Publick, or who have been Tutors or Curators, upon the balance of their reſpective Accompts.

All theſe ſeveral Caſes are thoſe which the Cuſtoms of *France* have ſpecified, although not any one of them comprehends them all. And one may perceive this to be common to them all, that the Ceſſion of Goods, and the Reſpite, are refuſed, either becauſe the Debtor has rendred himſelf unworthy of this benefit, as in the caſe of debts ariſing from Crimes and Offences, in a Depoſit, and in ſome others: or becauſe of the privilege of the debt, as in debts of Alimony, and Servants Wages: or by reaſon of the quality of the Creditor, as in debts owing to Minors, and to poor perſons who cannot wait for their Money.

It may be eaſily judged from theſe different Cauſes which exclude Debtors from the benefit of the Ceſſion of Goods, and of the Reſpite, that there may be ſeveral other Caſes to which the ſame Principles may be applied, according to the quality of the Credit, the Knavery of the Debtor, and the conſequences thereof with reſpect to the Publick Intereſt. And ſeeing the greateſt part of theſe Rules which except certain debts from the benefit of the Ceſſion of Goods, and of that of Reſpite, are obſerved in all the Cuſtoms of *France*, although they do not all make mention of them, and that ſeveral of them ſay nothing of any one of them, and alſo that almoſt all theſe Rules are obſerved in the Provinces which are governed by the Written Law, which is the *Roman* Law; one may in all places apply the Rules of Equity, which diſtinguiſh between the Caſes wherein the Ceſſion of Goods and the Reſpite may take place, and thoſe in which it would not be juſt or reaſonable to allow that benefit. Thus one may apply them in the Caſes where the Fraud of the Debtor may deſerve it, altho' the ſaid Caſes ſhould be different from thoſe mentioned in the Cuſtoms.

We thought it convenient to explain in this place the particular Cauſes which exclude Debtors from the benefit of the Ceſſion of Goods, and of Reſpite, becauſe the ſame being explained no where but in the Cuſtoms of *France*, it would not have been proper to ſet them down as Rules in the Articles of this Section.

It remains only that we remark on the Ceſſion of Goods, that not only it does not take place in Bankrupcies in *France*, but that by the Ordinances Fraudulent Bankrupts are puniſhed exemplarily, and even with death, and thoſe who partake in their Fraud are alſo puniſhed as their Accomplices[8].

[8] *Ordinance of* Orleans, *Art.* 143. *Of* Blois, *Art.* 205. *of* Henry IV. *in the year* 1609.

[*In* England, *the benefit of Ceſſion of Goods is allowed to no perſon by any general Law, except in the caſe of Bankrupts; who by ſurrendring themſelves, and making a full and ingenuous diſcovery of all their Goods or Eſtate, and of all Books, Papers, and Writings relating thereto, and delivering up to the Commiſſioners appointed for that purpoſe, all ſuch Goods or Eſtate, Books and Papers, as at the time of their Examination ſhall be in their power, and in all other things conform themſelves to the Act of Parliament, are diſcharged from all Debts owing by them at the time of Bankruptcy, as ſhall be further taken notice of in the ſecond Section of this Title.* Vid. Statute 4 & 5 Annæ, cap. 17. *And ſometimes poor Priſoners are diſcharged from their Debts by particular Acts of Parliament, they complying with the conditions therein preſcribed. As by* Stat. 6 Georgii, *which diſcharges all poor Priſoners, who ſhall in open Court ſubſcribe and deliver in a Schedule of their whole Eſtates, and the Names of their Debtors, and the Sums by them owing, and the Places of their Abode, and of the Witneſſes that can prove ſuch Debts, and ſhall take the Oath in the ſaid Act preſcribed. And the Eſtate, Debts, and Effects belonging to the ſaid Priſoners, are by the ſaid Act veſted in the Clerk of the Peace, who is to make an Aſſignment thereof to ſuch of the Creditors of the ſaid poor Priſoners as the major part of them ſhall direct, in Truſt for themſelves, and the reſt of the Creditors.*]

The CONTENTS.

1. *Definition of the Ceſſion of Goods.*
2. *The Ceſſion of Goods does not wholly diſcharge the Debtor.*
3. *The Ceſſion comprehends the Rights fallen to the Debtor.*
4. *Of goods which the Debtor acquires after the Ceſſion.*
5. *The Debtor ought to make the Ceſſion of his Goods upon Oath.*
6. *The Ceſſion of Goods does not immediately ſtrip the Debtor of the property of them.*
7. *The Ceſſion is not received, unleſs the Debtor own the debt.*
8. *The Ceſſion does not diſcharge the Sureties.*
9. *The Ceſſion made to ſome of the Creditors, takes place with regard to all.*

I.

THE Ceſſion of Goods is the ſurrender which the Debtor makes of all his Eſtate to his Creditors, that he may either get out of priſon, or avoid being caſt into it*. 1. *Definition of the Ceſſion of Goods.*

* Qui bonis ceſſerint, niſi ſolidum creditor receperit, non ſunt liberati. In eo enim tantummodo hoc beneficium eis prodeſt, ne judicati detrahantur in carcerem. *l.* 1. *C. qui bon. ced. poſſ. l. ult. eod.*

II.

2. The Ceſſion of Goods does not wholly diſcharge the Debtor.

The Ceſſion of Goods acquits the Debtor only for ſo much as the value of the Goods which he delivers up amounts to, and does not exempt him from remaining ſtill Debtor for the Overplus [b].

[b] Niſi ſolidum creditor receperit, non ſunt liberati. *l. 1. C. qui bon. ced. poſſ.*

III.

3. The Ceſſion comprehends the Rights fallen to the Debtor.

The Goods which the Debtor was not yet in poſſeſſion of when he made the Ceſſion of his Goods to his Creditors, but to which he had then actually acquired the Right, ſuch as an Inheritance which he had not as yet entred upon, are comprehended in the Ceſſion: and the Creditors may exerciſe upon the ſaid Goods the Rights of the Debtor [c].

[c] Si qua ipſi jura lex vel ex hæreditate, vel cognatorum donatione, in rebus mobilibus præſtet, in quarum poſſeſſione nondùm conſtitutus ſit, competere tamen ipſi videantur, poſſintque creditores, vel partem ex iis, vel etiam totum colligere. *Nov. 135. c. 1.*

IV.

4. Of Goods which the Debtor acquires after the Ceſſion.

The Goods which the Debtor may chance to acquire after the Ceſſion, will be ſubject to his Creditors for what ſhall remain ſtill unpaid of their debts, but the Creditors cannot throw the Debtor into priſon for the debts contracted before the Ceſſion, nor ſtrip him ſo of his new Acquiſitions, as not to leave him any thing for his ſubſiſtence. And one ought to leave him whereupon to ſubſiſt, eſpecially if what he has newly acquired has been given him for that end, and that it yields him no more than what is barely neceſſary for his Food and Raiment [d].

[d] Si quid poſteà eis pinguius acceſſerit, hoc iterùm uſque ad modum debiti poſſe à creditoribus legitimo modo avelli. *l. 7. in f. C. qui bon. cedere poſſ.*

Si debitoris bona venierint, poſtulantibus creditoribus permittitur rursùm ejuſdem debitoris bona diſtrahi, donec ſuum conſequantur, ſi tales tamen facultates acquiſitæ ſunt debitori quibus prætor moveri poſſit. *l. 7. ff. de ceſſ. bon. l. 3. C. de bon. auth. jud. poſſ.*

Is qui bonis ceſſit ſi quid poſteà acquiſierit, in quantùm facere poteſt convenitur. *l. 4. ff. de ceſſ. bon.*

Qui bonis ſuis ceſſit, ſi modicum aliquid poſt bona ſua vendita acquiſierit, iterùm bona ejus non veneunt. Unde ergo modum hunc æſtimabimus, utrùm ex quantitate ejus quod acquiſitum eſt, an verò ex qualitate? Et putem ex quantitate id æſtimandum eſſe ejus quod quæſiit, dummodò illud ſciamus ſi quid miſericordiæ cauſa ei fuerit relictum, putà menſtruum, vel annuum alimentorum nomine, non oportere propter hoc bona ejus iterato venundari: nec enim fraudandus eſt alimentis quotidianis. Idem & ſi uſusfructus ei ſit conceſſus vel legatus, ex quo tantùm percipitur, quantùm ei alimen ne ſatis eſt. *l. 6. eod.*

V.

The Debtor who is receive a Ceſſion of his Goods, ought upon Oath that he makes it without any fraudulent intent, and that he does not conceal any part of his Eſtate to the prejudice of his Creditors [e].

ought to make the Ceſſion of his Goods upon Oath.

[e] Jusjurandum per adoranda præbeat eloquia, *quod nullam rerum cauſa occaſionem, aut aurum reliquum habeat, unde æris alieni ſupplementum faciat.* Novell. 135. c. 1.

This Oath ought to contain, that there has been no fraudulent Alienation of the Goods, and that the declaration which the Debtor makes of his Goods is true. It is after this manner that this Oath is explained by ſome of the Cuſtoms of France, *which require alſo, that the Debtor ſhould promiſe upon Oath, that if ever he happens to be in better circumſtances, he will faithfully pay his debts.*

VI.

6. The Ceſſion of Goods does not immediately ſtrip the debtor of the property of them.

The Ceſſion of Goods does not immediately diveſt the perſon who makes it of the property of the goods which he gives up to his creditors. But if before the Goods are ſold, he finds himſelf in a condition either to pay his creditors, or to produce ſufficient exceptions againſt their claims, he may take back his goods. This is not to be underſtood of him who, without making this Ceſſion of Goods, had given his goods in payment to his creditors [f].

[f] Is qui bonis ceſſit, ante rerum venditionem utique bonis ſuis non caret. Quare ſi paratus fuerit ſe defendere, bona ejus non veneunt. *l. 3. ff. de ceſſ. bon.*

Quem pœnitet bonis ceſſiſſe, poteſt, defendendo ſe, conſequi ne bona ejus veneant. *l. 5. eod.*

Non tamen creditoribus ſua authoritate dividere hæc bona, & jure dominii detinere: ſed venditionis remedio, quatenùs ſubſtantia patitur, indemnitati ſuæ conſulere permiſſum eſt. Cum itaque contra juris rationem res jure dominii teneas ejus qui bonis ceſſit, te creditorem dicens, longi temporis præſcriptione petitorem ſubmoveri non poſſe manifeſtum eſt. Quod ſi non bonis eum ceſſiſſe, ſed res ſuas in ſolutum tibi dediſſe monſtretur, præſes provinciæ poterit de proprietate tibi accommodare notionem. *l. 4. C. qui bon. ced. poſſ.*

VII.

7. The Ceſſion is not received, unleſs the Debtor own the debt.

To be received to make a Ceſſion of Goods, it is neceſſary that the perſon own himſelf to be Debtor [g].

[g] Qui cedit bonis antequam debitum agnoſcat, condemnetur, vel in jus confiteatur, audiri non debet. *l. 8. ff. de ceſſ. bon.*

VIII.

8. The Ceſſion does not diſcharge the Sureties.

The Ceſſion of Goods does not diſcharge the Sureties of him who has made it [h].

[h] Ubicunque

[h] Ubicunque reus ita liberatur à creditore ut natura debitum maneat, teneri fidejuſſorem reſpondit. *l.* 60. *ff. de fidejuſſ.*

... poſſeſſio rerum debitoris data ſit creditori, æquè dicendum eſt fidejuſſorem manere obligatum. *l.* 21. §. 3. *in f. eod.*

IX.

9. The Ceſſion made to ſome of the Creditors, takes place with regard to all.

If the Debtor hath made a Ceſſion of his Goods to ſome of his Creditors, it hath its effect with regard to the others. For it is to all the Creditors that the Goods of him who makes the Ceſſion are given up [i]

[i] Sabinus & Caſſius putabant eum qui bonis ceſſit, ne quidem ab aliis quibus debet poſſe inquietari. l. 4. §. 1. *ff. de ceſſ. bon.*

SECT. II.

Of Diſcomfiture, or the Inſolvency of Debtors.

The Subject matter of this Section.

TO underſtand aright this matter of Diſcomfiture, or Inſolvency, it is neceſſary to diſtinguiſh three ſorts of Creditors. Thoſe who have a Privilege; thoſe who have no Privilege, but have a Mortgage, and thoſe who have neither Privilege nor Mortgage.

Among the Creditors who are privileged, and who have Mortgages, the Goods of the Debtor are diſtributed according to the Order which they have either by the preference of their Privileges, or priority of their Mortgages, purſuant to the Rules which have been explained in the Title of Pawns and Mortgages, and of the Privileges of Creditors. And as to the Creditors who have neither Privilege nor Mortgage, there being no preference, nor priority among them, the Goods of the Debtor are for that reaſon diſtributed among them in proportion to the Sums due to them; that is, that the condition of the Creditors being equal, every one of them has his portion of the Goods of the Debtor according to the quantity of his Claim: and if, for example, all the debts amount to the double of what is to be diſtributed, each Creditor will receive only the half of the Sum that is due to him. And this is what is called Contribution, which happens in two manners, either when the Goods are of ſuch a nature that they are not capable of being mortgaged, ſuch as Moveables in *France*, or when the Creditors have neither Privilege nor Mortgage on the Immoveables. For in that caſe, if the Goods of the Debtor are not ſufficient to ſatisfy all the Creditors, they come in rateably for a proportionable ſhare of the Goods as far as they will go towards the diſcharge of the debts: And in *France* we give the name of *Diſcomfiture* to this effect of the Inſolvency of the Debtor, which makes his Goods, on which the Creditors have neither Mortgage nor Privilege, to be diſtributed after this manner.

[*It may not be amiſs to obſerve here the difference between* Diſcomfiture *and* Bankrupcy. *The former takes in all ſorts of Debtors whatſoever, whether they be Merchants or others, whoſe Affairs are ſo diſcomfited and diſordered, that they have not enough left to pay their Creditors. Whereas the word* Bankrupcy *relates only to ſuch Perſons as uſe the Trade of Merchandiſe, or ſeek to get their living by Buying and Selling, who prove inſolvent, and againſt whom a Commiſſion of Bankrupcy does iſſue. The manner in which the Eſtates of Bankrupts are to be applied for payment of their debts, is particularly directed by ſeveral Acts of Parliament in* England, *by which all poſſible care has been taken to prevent fraudulent Bankrupcies, by making it Felony without benefit of Clergy, in the Bankrupt who is guilty of any wilful omiſſion in making a full and ample diſcovery of all his Goods or Eſtate. See the ſeveral Statutes relating to this matter.* 13 Eliz. cap. 7. 1 Jac. I. cap. 15. 21 Jac. I. cap 19. 4 & 5 An. cap. 17. 5 An. cap. 22. 5 Georgii. *Vid.* Mr. Serjeant *Goodinge's* Treatiſe of the Law of Bankrupts, *where he has collected a great many particular Caſes relating to the Diſtribution of the Effects of Bankrupts among their Creditors.*]

The CONTENTS.

1. *Definition of Diſcomfiture.*
2. *The Creditor who is poſſeſſed of a Pledge, is preferred as to that Pledge.*
3. *As alſo the Seller on the Thing ſold.*
4. *The caſe of a conditional debt.*

I.

1. Definition of Diſcomfiture.

DIſcomfiture is the condition in which a Debtor is, when his Eſtate is not ſufficient to pay all his debts, and when he has Goods of which the Price ought to be diſtributed among the Creditors rateably, without any Privilege, and without any Mortgage; ſo as that each Creditor may have his ſhare of the Goods, in proportion to the Sum that is due to him [a].

[a] Tributio fit pro rata ejus quod cuique debeatur. *l.* 5. §. *ult. ff. de tribut. act.* See what has been ſaid in the Preamble.

II.

2. The Creditor who is poſſeſſed of a Pledge, is preferred as

In the caſe of Diſcomfiture or Inſolvency, the Creditor who is in poſſeſſion of a Pledge, which the Debtor had given him for his Security, is preferred upon

to that Pledge. upon that Pledge before the other Creditors [b].

[b] Si qui contrahebant ipſam mercem pignori acceperint, puto debere dici præferendos. *l.* 5. §. 8. *ff. de tribut. act.*

We muſt not extend this Rule to the caſe of a Creditor who attaches the Moveables of his Debtor, if the Diſcomfiture happens during the Attachment; for in this caſe, the firſt who attaches is not preferred before the others. And it is expreſly ſo regulated by ſome Cuſtoms in France.

III.

3. As alſo the Seller on the Thing ſold. The Seller who has ſold a Thing, and lies ſtill out of the Money which he was to have for it, if he finds the Thing that he ſold in the hands of the Buyer, may ſeize on it, and he is not obliged to ſhare it with the other Creditors of the Buyer. And it would be the ſame thing, nay and with much more reaſon, if the Owner of the Thing had given it to the Debtor to ſell for him [c].

[c] Si dedi mercem meam vendendam, & extat: videamus, ne iniquum ſit in tributum me vocari. Et ſi quidèm in creditum ei abii, tributio locum habebit. Enimverò ſi non abii, quia res venditæ non aliàs deſinunt eſſe meæ, quamvis vendidero, niſi ære ſoluto, vel fidejuſſore dato, vel aliàs ſatisfacto, dicendum erit, vindicare me poſſe. *l.* 5. §. 18. *ff. de tribut. act.*

But if the Thing ſold be not any more in the poſſeſſion of the Buyer, will the Seller have the preference before the Creditors of a third perſon who ſhall have purchaſed it from the Buyer? There are ſome Cuſtoms in France *where they make a diſtinction between the condition of a Seller who has ſold without any day or term of payment, expecting ready Money for his Goods, and the condition of the Seller who has given time for payment; and they give a preference in the firſt caſe, but not in the ſecond. To which we may apply the words of the text cited upon this Article:* Si in creditum abii, ſi non abii. *See the remark on the fourth Article of the fifth Section of Pawns and Mortgages.*

IV.

4. The caſe of a conditional debt. If among the Creditors who come in rateably for a ſhare of the Goods of a Debtor in the caſe of Diſcomfiture or Inſolvency, there ſhould be found any one whoſe debt depended on the event of a condition, or which ought not to be paid till a long time after; it would be neceſſary either to leave ſo much of the Goods as would come to this Creditor's ſhare, or that the other Creditors who ſhould receive the ſame, ſhould bind themſelves, and give Security, if it ſhould be found neceſſary, to pay back their ſeveral proportions of this Creditor's ſhare after the condition ſhould happen, or the term of payment come [d].

[d] Illud quoque cavere debet, ſi quid aliud domini debitum emerſerit, refuſurum ſe ei pro rata. Finge enim conditionale debitum imminere, vel in occulto eſſe, hoc quoque admittendum eſt. *l.* 7. *ff. de trib. act.*

TITLE VI.

Of the RESCISSION of Contracts, and RESTITUTION of Things to their firſt eſtate.

THere is this difference between all the other manners of annulling or diminiſhing Engagements which have been explained in this Book, and theſe which are the ſubject of this Title; that all the others put an end to Engagements without calling their validity in queſtion, whereas Reſciſſions and Reſtitutions of things to their firſt eſtate, reſpect the validity of the Engagements, and make them either wholly void, or make ſuch changes in them as may ſeem juſt and equitable. Thus, when a Minor is relieved againſt an Obligation which he had contracted in his Minority, this Obligation is annulled either in the whole, if none of the Money for which it was contracted was laid out to the advantage of the Minor, or for ſo much of the Money as has not been uſefully imployed, and he pays no part thereof. Thus, when a Major is relieved againſt a Contract extorted by force, his engagement is annulled.

Difference between the ſubject matter of this Title, and the matters treated of in the other Titles of this Book.

Theſe words of Reſciſſion and Reſtitution, ſignify in reality only the ſame thing; to wit, the benefit which the Laws grant to thoſe who complain of ſome Fraud, ſome Error, ſome Surprize in Acts or Deeds to which they have been parties, that they may be reſtored to the ſame condition in which they were before the execution of the ſaid Acts or Deeds.

Although it may ſeem that the word Reſtitution is particularly applicable to Perſons, who becauſe of ſome quality are relieved from their Engagements, ſuch as Minors, and married Women who have bound themſelves without the Authority of their Huſbands; or even with their Authority, in the Provinces where they cannot bind themſelves at all: and that the word Reſciſſion belongs properly to the Act or Deed which is repealed and annulled becauſe of ſome vice therein, as if it is

an

gation which has been extorted ; or which one has been drawn ſome Error, or by ſome Sur- which is ſufficient to annul it ; diſtinction between Reſtitutions and Reſciſſions, does not hinder them from being often confounded together, becauſe both the one and the other tend to annul the Act or Deed that is liable to be reſcinded. And therefore in this Title we ſhall uſe both theſe words in one and the ſame ſenſe.

We muſt not confound the matter of Reſciſſions and Reſtitutions, with that which has been treated of under the Title of the Vices of Covenants. For altho' the Vices of Covenants be ſo many Cauſes of Reſciſſion, and that there is no cauſe of Reſciſſion which is not comprehended in what has been ſaid concerning the Vices of Covenants [a], yet there is this difference between the ſubject matter of this Title, and that of the Title of the Vices of Covenants; that in that Title there is explained only the nature of thoſe Vices, and their effects, and that altho' ſomething has been hinted at there, of their giving occaſion to the repealing or annulling of Covenants, yet the Rules of Reſciſſions and Reſtitutions are not explained in that Title; but in this we are to explain the ſaid Rules, ſuch as thoſe which reſpect in general the nature of Reſciſſions, their effects, their conſequences, and thoſe which particularly relate to the different kinds of Reſciſſions; the caſes in which they take place; the Reſtitutions of Minors, and the other Rules of the like nature.

[a] *See the Preamble to the Title of the Vices of Covenants.*

All theſe ſorts of Rules which are to be the ſubject matter of this Title, may be reduced under three Heads which comprehend them all, and we ſhall divide them into as many Sections. The firſt ſhall contain the Rules which are common to all ſorts of Reſciſſions and Reſtitutions: The ſecond ſhall take in thoſe which reſpect the Reſtitutions of Minors: And the third ſhall comprehend the Rules which have relation to the Reſtitution of Majors, in the caſes where they may have juſt cauſe to ſue for the repeal of their Contracts.

SECT. I.

Of Reſciſſions and Reſtitutions in general.

IT is neceſſary to obſerve touching this matter of Reſciſſions and Reſtitutions in general; that according to our Uſage in *France*, the ways of Nullity do not take place; that is to ſay, that one cannot procure an Act or Deed to be annulled, to which he has been a party, by barely alledging the grounds and reaſons which render it null; but it is neceſſary to procure Letters from the Prince, in order to obtain a Reſciſſion of the Deed, and Reſtitution of things to their firſt eſtate.

It is likewiſe proper to take notice here, that all Reſciſſions and Reſtitutions, upon what ground ſoever they be built, whether it be Fraud, Violence, Damage in more than the half of the true value; or any other ground whatſoever, preſcribe in ten years, reckoning from the day of the Act or Deed which is complained of, or from the time that the Violence, or other Cauſe which may have hindred the party from bringing his Action, ſhall have ceaſed. And with reſpect to Minors, the Reſtitution preſcribes in ten years, counting from the day of their Majority; and after thirty five years compleat, the age of Majority in *France* being twenty five, one is not admitted to ſue for Reſtitution [a]. We have made here this Remark, becauſe the time of Reſciſſion was ſhorter in the *Roman* Law [b]; for which reaſon we have not ſet down the preciſe time in the thirteenth Article of this Section, where mention is made of the time of Reſciſſions and Reſtitutions.

[a] *See the Ordinance of 1510. art. 46. that of 1535. ch. 8. art. 30. that of 1539. art. 134.*

[b] *V. l. ult. C. de tempor. in int. reſtit.*

The CONTENTS.

1. *Definition of Reſciſſion and Reſtitution.*
2. *The Deed may be annulled, altho' the party be not guilty of any fraud.*
3. *Reſtitution againſt Sentences, or Decrees.*
4. *Reſciſſions depend on the prudence of the Judge.*
5. *They ought not to be granted eaſily.*
6. *Effect*

6. *Effect of the Reſciſſion againſt third perſons.*
7. *The Heir may be relieved in right of the deceaſed.*
8. *A ſpecial Proxy is neceſſary for the demanding of a Reſciſſion.*
9. *The Party's Ratification of the Act, hinders the Reſciſſion of it.*
10. *Reciprocal effects of the Reſciſſion.*
11. *Limits of the Reſciſſion, if there be matters in the Act or Deed, which it has no relation to.*
12. *Reſciſſion of one part which hath its effect for the whole.*
13. *The time for demanding a Reſciſſion.*
14. *When this time begins to run.*
15. *How the time is computed, with reſpect to Heirs and Executors.*

I.

1. *Definition of Reſciſion and Reſtitution.*

THE Reſciſſion of a Contract, or Reſtitution of things to their firſt eſtate, is a benefit which the Laws give to him who has been aggrieved by ſome Act or Deed, to which he was a party, that he may be put in the ſame condition he was in before the ſaid Act or Deed, if there be any juſt cauſe for it [a].

[a] Sub hoc titulo plurifariam prætor hominibus vel lapſis, vel circumſcriptis ſubvenit. *l.* 1. *ff. de in int. reſt.* Omnes in integrum reſtitutiones causâ cognitâ a prætore promittuntur. *l.* 3. *eod.*

We have explained in the Preamble to this Title, the difference there may be between Reſtitution, and Reſciſſion of Contracts.

II.

2. *The Deed may be annulled, altho' the party be not guilty of any fraud.*

It is not always neceſſary for obtaining the Reſciſſion of a Deed, or Reſtitution of things to their firſt condition, that the party who demands it ſhould prove that it is by the fraud of his adverſary that he has been deceived; but it ſufficeth in many caſes, that there be in it ſome grievance of another nature, provided it be ſuch as that it ought to have this effect [b]. Thus, for example, if a Minor has borrowed Money which he has fooliſhly and idly ſquandered away, the upright and honeſt intention of his Creditor will not hinder the Reſtitution [c]. Thus, a Major who is wronged in a Partition, will procure the ſame to be redreſſed, altho' the perſon who is concerned with him in the Partition cannot be charged with any fraud [d].

[b] Si nullus dolus interceſſit ſtipulantis, ſed ipſa res in ſe dolum habet. *l.* 36. *ff. de verb. obl.* See the ninth Article of the ſixth Section of Covenants; and the fourth Article of the third Section of the Vices of Covenants.

[c] *See the ſecond Article of the ſecond Section.*

[d] *See the third Article of the third Section.*

III.

3. *Reſtitution againſt Sentences or Decrees.*

One may procure to be reſcinded or annulled, not only Covenants, or other Acts which one has made voluntarily, but even Sentences or Decrees of a Court of Juſtice to which they have been Parties, if there be juſt cauſe for it; as if he who complains be a Minor who was not defended in the Suit, or even although he be Major, if he can ſhew that his adverſary has been guilty of ſome fraud, or offers any other reaſon which the Law approves of [e].

[e] Nec intra has ſolum ſpecies conſiſtet hujus generis auxilium. Etenim deceptis, ſine culpa ſua, maximè ſi fraus ab adverſario intervenerit, ſuccurri oportebit. *l.* 7. §. 1. *ff. de in int. reſt.*

Sed & in judiciis ſubvenitur, ſive dum agit, ſive dum convenitur, captus ſit. *l.* 7. §. 4. *ff. de min. d. l.* §. *ult.*

This is the foundation of the uſe of Civil Requeſts, even for Majors. The grounds of a Civil Requeſt are explained in the Ordinances. See the Ordinance of 1667. in the Title of Civil Requeſts, art. 34. 35. 36.

IV.

4. *Reſciſſions depend on the prudence of the Judge.*

Reſciſſions being founded upon facts and circumſtances, as if the party has been guilty of ſome fraud, if any force has been uſed againſt him who prays to be relieved, if he has been drawn in by ſome error, or ſome ſurprize, or if there be any other cauſe aſſigned which may be ſufficient to obtain a Reſciſſion; the ſame is not decreed till after a Judicial hearing of the Cauſe. And it depends on the prudence of the Judge to diſcern if the reaſons which are alledged be ſufficient, and if it be equitable to decree the Deed or Contract to be reſcinded [f].

[f] Sub hoc titulo plurifariam prætor hominibus vel lapſis, vel circumſcriptis ſubvenit: ſive metu, ſive calliditate, ſive ætate, ſive abſentia inciderunt in captionem. *l.* 1. *ff. de in integ. reſt.*

Omnes in integrum reſtitutiones causâ cognitâ à prætore promittuntur: ſcilicet ut juſtitiam earum cauſarum examinet, an veræ ſint, quarum nomine ſingulis ſubvenit, *l.* 3. *eod.*

Ubi æquitas evidens poſcit, ſubveniendum eſt. *l.* 7. *eod.*

V.

5. *They ought not to be granted eaſily.*

Among the circumſtances which are to be weighed in the grant of a Reſciſſion, one ought to conſider, of what moment the Thing in diſpute is, and what will be the conſequences of the Reſciſſion if it is granted. For it ought not to be eaſily granted under the circumſtances, where the damage to be repaired is inconſiderable, and where the Reſciſſion which is prayed on account of the ſaid Damage, might be attended with

conſequences which would amount to ſome injuſtice [g].

[g] ...cio illud à quibuſdam obſervatum, ne propter ...nimam rem vel ſummam, ſi majori rei vel ...æ præjudicetur, audiatur is qui integrum re... poſtulat. *l.* 4. *ff. de in int. reſt.*

VI.

6. Effect of the Reſciſſion againſt third perſons.

When there is ground for granting a Reſciſſion, the ſame hath its effect not only againſt the perſons whoſe fact has given occaſion to it, but likewiſe againſt thoſe who repreſent them, and againſt third poſſeſſors. Thus, for example, if he who had purchaſed an Eſtate of a Minor, ſells it to a third perſon, the Reſtitution of the Minor will take place againſt the ſaid third perſon, and againſt every other poſſeſſor, and the Purchaſer will have his remedy only againſt his Seller. Thus, a Proprietor who is ſtript of his Eſtate by a Sale, or other Contract, to which he was conſtrained to give his conſent by ſome violence, may bring his Action againſt any poſſeſſor whatſoever of the ſaid Eſtate, and he will recover it from him, although that third poſſeſſor had no hand in the violence [h].

[h] Interdum autem reſtitutio & in rem datur minori, id eſt, adverſus rei ejus poſſeſſorem, licet cum eo non ſit contractum. Ut puta, rem à minore emiſti, & alii vendidiſti: poteſt deſiderare interdum adverſus poſſeſſorem reſtitui, ne rem ſuam perdat, vel re ſua careat. *l.* 13. §. 1. *ff. de minor.* See the twenty ſeventh Article of the ſecond Section.

In hac actione non quæritur utrùm is qui convenitur, an alius metum fecit: ſufficit enim hoc docere, metum ſibi illatum, vel vim. *l.* 14. §. 3. *ff. quod metus cauſ.* See the ſixth Article of the ſecond Section of the Vices of Covenants.

VII.

7. The Heir may be relieved in right of the deceaſed.

The Heirs of thoſe who had a right to be relieved againſt any Deed or Contract, may ſue to have the ſame reſcinded [i]. For altho' the Action ſeems to belong only to the perſon who has been wronged, yet the Right of demanding reparation of the loſs he has ſuſtained in his Goods, will paſs to his Heir. And even the Father, who is Heir to his Son who was a Minor, may demand Reſtitution in the right of his Son [k].

[i] Non ſolùm minoris, verùm quoque eorum qui reipublicæ cauſâ abfuerunt: item omnium, qui ipſi potuerunt reſtitui in integrum, ſucceſſores in integrum reſtitui poſſunt. Et ita ſæpiſſimè eſt conſtitutum. *l.* 6. *ff. de in integ. reſt.*

Non ſolùm minoribus, verùm ſucceſſoribus quoque minorum datur in integrum reſtitutio, etſi ſint ipſi majores. *l.* 18. §. *ult. ff. de min.*

[k] Pomponius adjicit, ex cauſis ex quibus in re peculiari filiifamilias reſtituuntur, poſſe & patrem quaſi hæredem nomine filii poſt obitum ejus impetrare cognitionem. *l.* 3. §. 9. *eod.* See the fifteenth Article.

VIII.

8. A ſpecial Proxy is neceſſary for the demanding a Reſciſſion

The Reſciſſion cannot be demanded by a Proxy or Attorney, although he ſhould produce a general Letter of Attorney; but he muſt have a ſpecial Power or Proxy to authorize him to make a demand of this nature [m]. For the ſilence of the perſon who might complain of an Act or Deed, is an approbation thereof: And it is reaſonable to preſume, that ſeeing he does not expreſly ſignify his deſire to be relieved, he is willing to abide by what has been done.

[m] Si talis interveniat juvenis cui præſtanda ſit reſtitutio, ipſo poſtulante præſtari debet, aut procuratori ejus cui id ipſum nominatim mandatum ſit. Qui verò generale mandatum de univerſis negotiis gerendis alleget, non debet audiri. *l.* 25. §. 1. *ff. de min.*

IX.

9. The Party's ratification of the Act hinders the Reſciſſion of it.

If the cauſe of the Reſtitution having ceaſed, he who might have been relieved has ratified the Act or Deed which he had ground to complain of, he will not afterwards be admitted to ſue for the Reſciſſion thereof; for the approbation makes a new Act which confirms the former. Thus, for example, if a Minor being come of Age ratifies an Obligation againſt which he might have been relieved, he cannot afterwards ſue for relief [n]. Thus he who being at full liberty ratifies an Act which he pretended he was forced to conſent to, cannot any more complain of it.

[n] Qui poſt vigeſimum quintum annum ætatis, ea quæ in minore ætate geſta ſunt rata habuerint, fruſtra reſciſſionem eorum poſtulant. *l.* 2. *C. ſi maj. facti. rat. habuer. l.* 30. *ff. de min.* See the twenty third Article of the ſecond Section.

X.

10. Reciprocal effects of the Reſciſſion.

If the Reſciſſion or Reſtitution is decreed, things are reſtored, on the part of him who is relieved, to the ſame condition in which they would have been, if the Act or Deed which is annulled had never been made. But as he enters again to the poſſeſſion of his Rights, and recovers what ought to be reſtored to him, either in Principal, or Intereſt and Fruits, if there be ground for it; ſo ought he likewiſe on his part to give back to his adverſe party what profit he has reaped thereby, ſo that he may draw no other advantage from the Reſciſſion, beſides the bare effect of entring again to his Rights, his Adverſary

ſary being likewiſe reſtored on his part to his Rights, as far as the effect of the Reſciſſion will permit. Thus, the Seller who procures a Contract of Sale to be vacated, of which he had received the Price, ought to give back the ſaid Price. But if a Minor is relieved againſt a Sale which he had made, or againſt the Grant of an Annuity which he had made for borrowed Money; he ſhall reſtore of the Price of the Sale, and of the Money he has borrowed, only ſo much as ſhall be found to have turned to his benefit, by an uſeful application thereof. Thus, the Reſciſſion is reciprocal or not, according to the Juſtice that may be due to him who is relieved [o].

[o] Qui reſtituitur in integrum ſicut in damno morari non debet, ita nec in lucro. Et ideò, quidquid ad eum pervenit, vel ex emptione, vel ex venditione, vel ex alio contractu, hoc debet reſtituere. *l. un. C. de reput. quæ f. in jud. in int. reſt.*

Reſtitutio ita facienda eſt, ut unuſquiſque jus ſuum recipiat. Itaque, ſi in vendendo fundo circumſcriptus reſtituetur, jubeat prætor emptorem fundum cum fructibus reddere, & pretium recipere: niſi ſi tunc cum dederit cùm eum perditurum non ignoraret. *l. 24. §. 4. ff. de minor.*

Sed & cùm minor adiit hæreditatem & reſtituitur, mox quidquid ad eum ex hæreditate pervenit, debet præſtare. Verùm & ſi quid dolo ejus factum eſt, hoc eum præſtare convenit. *d. l. un. §. 2. C. de reput. quæ f. in jud. in integ. reſt.*

XI.

11. Limits of the Reſciſſion, if there be matters in the Act or Deed which it has no relation to.

If in the Act or Deed of which the Reſciſſion is demanded, there were other matters beſides thoſe which he who ſues for relief may have ground to complain of, and if they have no connexion one with another, the Reſciſſion would be limited to that which may give occaſion for it, and would not be extended to the other matters contained in the ſaid Act or Deed. But if there were any connexion between the different parts of the ſaid Act or Deed, the effect of the Reſciſſion would reach them all, whether it were in favour of him who ſhould demand it, or for the intereſt of the adverſe party, in every thing that ought to be reſtored to its former ſtate and condition [p].

[p] Ex cauſa curationis condemnata pupillo, adverſus unum caput ſententiæ reſtitui volebat. Et quia videtur in cæteris litis ſpeciebus relevata fuiſſe actor major ætate qui acquievit tunc temporis ſententiæ, dicebat totam debere litem reſtaurare. Herennius Modeſtinus reſpondit, ſi ſpecies in qua pupilla in integrum reſtitui deſiderat, cæteris ſpeciebus non cohæret, nihil proponi cur à tota ſententia actor poſtulans audiendus eſt. *l. 29. § 1. ff. de minor.*

XII.

12. Re-

If a Tutor had ſold an Eſtate belonging in common to him and his Minor, and the ſaid Minor ſhould get himſelf relieved from the ſaid Bargain; the Purchaſer might oblige the Tutor who ſold him the Eſtate to take back his portion of it, for this reaſon, that he would not be bound to divide the effect of the Contract, and to keep one part of the Eſtate, which he would not have bought without the reſt [q].

ſciſſion of one pr s, who h hath as effect for the whole.

[q] Curator adoleſcentium prædia communia ſibi & his quorum curam adminiſtrabat, vendidit. Quæro, ſi decreto prætoris adoleſcentes in integrum reſtituti fuerint; an eatenùs venditio reſcindenda ſit, quatenus adoleſcentium pro parte fundus communis fuit? Reſpondit eatenùs reſcindi, niſi ſi emptor à toto contractu velit diſcedi, quod partem empturus non eſſet. *l. 43. §. 1. ff. de min.*

XIII.

13. The time for demanding a Reſciſſion.

Reſciſſions and Reſtitutions ought to be demanded within the time preſcribed by Law; and when that is expired, no demand of this kind is received [r].

[r] *V. l. ult. C. de temp. in int. reſtit.*

We do not ſet down here the words of this Law; for the time for commencing Actions of Reſciſſion and Reſtitution is otherwiſe regulated by the Ordinances. See what has been ſaid of this matter in the Preamble to this Section.

XIV.

14. When this time begins to run.

The time of this Preſcription begins to run from the day that the cauſe of the Reſciſſion has ceaſed. Thus, it begins againſt Minors from the day of their attaining Majority; and againſt Majors, from the day that they ſhall have been at liberty to enter their Action [s].

[s] Et quemadmodum omnis minor ætas excipitur in minorum reſtitutionibus, ita & in majorum tempus quo rei publicæ cauſa abfuerint, vel aliis legitimis cauſis, quæ veteribus legibus enumeratæ ſunt, fuerint occupati, omne excipiebatur. Et non abſimilis ſit in hac parte minorum & majorum reſtitutio. *l. ult. C. de temp. in int. reſtit.* See the Preamble to this Section.

XV.

15. How the time is computed with reſpect to Heirs and Executors.

This time of Preſcription is reckoned with reſpect to Heirs and Executors who demand the Reſtitution, in ſuch a manner as to join the time which had run againſt the perſon to whom they ſucceed, to that which has run againſt themſelves. But if the Heir were a Minor, his time would not begin to be added to that of the deceaſed, till after the day of his Majority. For he would be relieved even againſt that, in that he had neglected to demand Reſtitution during his Minority [t].

[t] Interdum tamen ſucceſſori pluſquàm annum dabimus, ut eſt ex edicto expreſſum: ſi fortè ætas ipſius ſubveniat. Nam poſt annum viceſimum quintum

quintum habebit legitimum tempus, hoc enim ipſo deceptus videtur, quòd cùm poſſet reſtitui intra tempus ſtatutum ex perſona defuncti, hoc non fecit. Planè ſi defunctus ad in integrum reſtitutionem modicum tempus ex anno utili habuit, huic hæredi minori poſt annum viceſimum quintum completum non totum ſtatutum tempus dabimus ad integrum reſtitutionem, ſed id dumtaxat tempus, quod habuit is cui hæres extitit. *l.* 19. §. 1. *ff. de minor.*

SECT. II.

Of the Reſtitution of Minors.

NO body is ignorant who the perſons are who are called Minors, and wherein they are diſtinguiſhed from thoſe who are called Majors. As to which the Reader may conſult what has been ſaid of this matter in the ſixteenth Article of the firſt Section of the Title of Perſons, and in the ninth Article of the ſecond Section of the ſame Title.

The CONTENTS.

1. *The cauſe of the Reſtitution of Minors.*
2. *This Reſtitution is independent of the honeſty or knavery of the party.*
3. *The Minor is not relieved in all caſes without diſtinction.*
4. *He is not relieved againſt what has been done for juſt and reaſonable cauſes.*
5. *The Minor is not relieved when he cheats, or does any harm.*
6. *Nor when he is guilty of any Crime, or Offence.*
7. *If a Minor gives it out that he is of age.*
8. *Minors are relieved from all manner of damage, except in the caſes of the preceding Articles.*
9. *The Minor is relieved againſt all ſorts of Acts or Deeds, in which he is injured.*
10. *He is relieved if he has accepted an Inheritance, or Legacy, that is burdenſome, or refuſed one that is profitable.*
11. *If the Succeſſion is profitable when the Minor enters to it, but becomes afterwards burdenſome by ſome accident.*
12. *If the Succeſſion which the Minor has renounced, is cleared and diſentangled by another Heir.*
13. *The Reſtitution takes place for the profits of which the Minor has been deprived.*
14. *The Minor is relieved from an Engagement that would run him into Law-Suits, and Expences.*
15. *The Minor is relieved againſt a Compromiſe.*
16. *Reſtitution againſt an omiſſion.*
17. *The Minor is relieved againſt an Obligation for borrowed Money, if he has not laid out the Money to his advantage.*
18. *Reſtitution between two Minors.*
19. *The Authority of the Tutor does not hinder the Reſtitution; and the Minor is reſtored, even againſt the Act of the Tutor.*
20. *Minority ends at five and twenty years compleat.*
21. *The Surety of a Minor.*
22. *Diſpenſation of Age.*
23. *The Ratification of an Act, after one is come of age, hinders the Reſtitution.*
24. *The Immoveables of Minors cannot be alienated without neceſſity.*
25. *Formalities to be obſerved in the Sale of the Immoveables of Minors.*
26. *A Sale made by the Tutor, without obſerving the formalities.*
27. *Effect of the Reſciſſion againſt the Tutor, if there be ground for it, and alſo againſt the Poſſeſſor.*
28. *Improvements made by the Purchaſer of Lands and Tenements belonging to a Minor.*
29. *Reſtitution of a Purchaſe made by a Minor.*

I.

THE Reſtitution of Minors is founded on the weakneſs of their Age, and on the inſtability of their Conduct, for want of experience, and knowledge in buſineſs. And ſeeing this condition expoſes them not only to be impoſed upon by others, but likewiſe to be miſtaken often in their own intereſt; the Law gives them relief againſt all Acts and Deeds by which their Minority may have engaged them in ſome damage. *1. The cauſe of the Reſtitution of Minors.*

* Hoc Edictum prætor naturalem æquitatem ſecutus propoſuit, quo turelam minorum ſuſcepit. Nam cum inter omnes conſtet, fragile eſſe, & infirmum ejuſmodi ætatum conſilium, & multis captionibus ſuppoſitum, multorum inſidiis expoſitum: auxilium eis prætor hoc edicto pollicitus eſt, & adverſus captiones opitulationum. *l.* 1. *ff. de minor.*

II.

It follows from the preceding Rule, that the Reſtitution of Minors being founded on their weakneſs, and on their want of experience, and knowledge in Affairs; *2. This Reſtitution is independent of the honeſty or knave-*

ry of the party.

Affairs; the ſame is altogether independent on the honeſty or knavery of thoſe with whom they have treated. And whether it be that they themſelves have been miſtaken, or that the perſons with whom they have had to do have overreached them, the Reſtitution is equally granted to them, with the effect which it ought to have. Thus, the Law protects Minors, both againſt their own proper Act and Deed, and alſo againſt that of perſons who would take advantage of their eaſineſs and weakneſs [b].

[b] Vel ab aliis circumventi, vel ſua facilitate decepti. *l.* 44. *ff. de min.*

Minoribus in integrum reſtitutio in quibus ſe captos probare poſſunt, etſi dolus adverſarii non probetur, competit. *l.* 5. *C. de integ. reſt. min.*

Lex conſilio ejus quaſi parum firmo reſtitit. *l.* 4. *in f. ff. de ſerv. expor.*

III.

3. The Minor is not relieved in all caſes without diſtinction.

It follows alſo from the ſame Rule explained in the firſt Article, that Minors being relieved only when they are actually wronged thro' their weakneſs of age, and eaſineſs of temper; they are not indifferently reſtored againſt all the Acts or Deeds which they may complain of. But it is by the circumſtances of their own Conduct, of that of the Parties with whom they have to do, of the quality of the fact of which they complain, of the cauſes and conſequences of the Damage, and other the like circumſtances, that we are to examine if it be juſt that they ſhould be relieved, or not. For the intention of the Law is not to exclude them from the uſe of all Affairs, and of all Commerce; but only to prevent their deceiving themſelves, or being deceived by others [c]. Thus, they are relieved, or not, according to the Rules which follow.

[c] Prætor edicit, quod cum minore quàm viginti quinque annis natu, geſtum eſſe dicetur, uti quæque res erit animadvertam. *l.* 1. §. 1. *ff. de minor.*

Non omnia quæ minores annis viginti quinque gerunt irrita ſunt. *l.* 44. *eod.*

Sciendum eſt non paſſim minoribus ſubveniri, ſed cauſa cognita, ſi capti eſſe proponantur. *l.* 11. §. 3. *eod.*

Non ſemper autem ea quæ cum minoribus geruntur reſcindenda ſunt, ſed ad bonum & æquum redigenda ſunt: ne magno incommodo hujus ætatis homines afficiantur, nemine cum his contrahente: & quodammodo commercio eis interdicetur. Itaque, niſi aut manifeſta circumſcriptio ſit, aut tam negligenter in ea cauſa verſati ſunt, prætor interponere ſe non debet. *l.* 24. §. 1. *eod.*

IV.

4. He is not relieved a-

If a Minor who prays to be relieved, does not alledge ſomething that may be imputed either to his own bad conduct, or to ſome ſurprize from his adverſe party, and if he has done nothing but what his intereſt, or ſome duty obliged him to do; as if he has borrowed Money to pay a juſt debt, which he diſcharged therewith, or if he has bought things neceſſary, even altho' they may have chanced to periſh by ſome accident, he could not be relieved [d]. Thus, a Minor will not be reſtored againſt him who by his order had furniſhed Alimony to the Minor's Father or Mother in their neceſſity, according as his Condition and Eſtate might allow of it, ſeeing the Minor might be conſtrained by Law to maintain his Parents according to his ability [e]. Thus a Minor who had forgiven an Injury which he might have complained of to a Court of Juſtice, will have no relief in this matter, nor be allowed to ſue afterwards for a reparation of the ſaid Injury [f].

gainſt what has been done for juſt and reaſonable cauſes.

[d] Non reſtituetur qui ſobriè rem ſuam adminiſtrans occaſione damni non inconſultè accidentis, ſed fato, velit reſtitui. Nec enim eventus damni reſtitutionem indulget, ſed inconſulta facilitas. Et ita Pomponius libro viceſimo octavo ſcripſit. Unde Marcellus apud Julianum notat, ſi minor ſibi ſervum neceſſarium comparaverit, mox deceſſerit, non debere eum reſtitui, neque enim captus eſt, emendo ſibi rem perneceſſariam, licet mortalem. *l.* 11. §. 4. *ff. de min.*

Non videtur circumſcriptus eſſe minor, qui jure ſit uſus communi. *l. ult. C. de in int. reſt. min.*

[e] Filia tua non ſolùm reverentiam, ſed etiam ſubſidium vitæ ut exhibeat tibi, rectoris provinciæ authoritate compelletur. *l.* 5. *C. de patr. poteſt. v. l.* 5. *ff. de agnoſc. & al. lib. d. l.* §. 2. See the fourth Article of the fifth Section of Tutors.

[f] Auxilium in integrum reſtitutionis exactionibus pœnarum paratum non eſt: ideòque injuriarum judicium ſemel omiſſum, repeti non poteſt. *l.* 37. *ff. de minor.*

V.

5. The Minor is not relieved, when he cheats, or does any harm.

The Minor who ſhall have cheated any one, or done ſome damage, will not be relieved on the ſcore of his Minority, ſo as to be diſcharged from repairing the damage he has done. Thus, a Minor who damnifies a Thing which he has borrowed, or which has been depoſited with him, will not be reſtored ſo as to be acquitted of the damage which he ſhall have cauſed [g].

[g] Nunc videndum, minoribus utrum in contractibus captis dumtaxat ſubveniatur, an etiam delinquentibus, ut putà dolo aliquid minor fecit in re depoſita, aut commodata, vel alias in contractu: an ei ſubveniatur, ſi nihil ad eum pervenit: Et placet in delictis minoribus non ſubveniri, nec hic itaque ſubvenietur. *l.* 9. §. 2. *ff. de minor.*

Si damnum injuria dedit, non ei ſubvenitur. *d.* §. 2.

Errantibus, non etiam fallentibus minoribus, publica

publica jura ſubveniunt. *l.* 2. *C. ſi min. ſe maj. dix.*

Deceptis, non decipientibus opitulandum. *l.* 2. §. 3. *ff. ad Velleian.*

VI.

6. Nor when he is guilty of any Crime, or Offence.

In Crimes and Offences the Minority may give occaſion to mitigate the Puniſhments, but it does not hinder the Minor from being condemned to make reparation of the damage which he has done[h].

[h] In delictis minor annis viginti quinque non meretur in integrum reſtitutionem, utique atrocioribus, niſi quatenùs interdum miſeratio ætatis ad mediocrem pœnam judicem produxerit, *l.* 37. §. 1. *ff. de minor.*

Non ſit ætatis excuſatio adverſus præcepta legum, ei qui dum leges invocat, contra eas committit, *d. l.* 37. *in fine.* In criminibus ætatis ſuffragio minores non juvantur. Etenim malorum mores infirmitas animi non excuſat. *l.* 1. *C. ſi adv. delict.* Malitia ſupplet ætatem. *l.* 3. *C. ſi min. ſe maj. dix.*

VII.

7. If a Minor gives it out that he is of age.

If a Minor has given out that he is of age, and by producing a falſe Certificate of the Regiſtry of his Chriſtening, or by ſome other way, has made people believe that he is a Major, he cannot be relieved againſt thoſe Acts into which he ſhall have engaged any one by this ſurpriſe. Thus, a Minor having borrowed Money by ſuch means, although he has made no good uſe of it, yet his Obligation will nevertheleſs have the ſame effect as that of a Major[i].

[i] Si is qui minorem nunc ſe eſſe aſſeverat, fallaci majoris ætatis mendacio te deceperit, cùm juxta ſtatuta juris, errantibus non etiam fallentibus minoribus publica judicia ſubveniant, in integrum reſtitui non debet. *l.* 2. *C. ſi min. ſe maj. dix. l.* 3. *eod. l.* 32. *ff. de minor.*

This Rule is to be underſtood only of the caſes where the Creditor has had ſome juſt reaſon to believe that the Minor was of age. For if there was no more than a bare declaration of the Minor's, who pretended to be of age, the Creditor ought to blame himſelf for his credulity. And therefore we have conceived the Rule in theſe terms.

VIII.

8. Minors are relieved from all manner of damage, except in the caſes of the preceding Articles.

Seeing Minors are not relieved indifferently in all caſes, but according as the quality of the facts and the circumſtances may give occaſion thereto, and ſince we have ſeen in the foregoing Articles the Rules which relate to the caſes in which Reſtitution is not granted; we ſhall next ſee in the Articles which follow, how it takes place, whether the Minors have been deceived by the deed of others, or by the weakneſs of their own judgments. For the integrity of the perſon who treats with a Minor, does not hinder the Reſtitution: but he ought to blame himſelf for not taking the precaution to inform himſelf of the condition of the perſon with whom he treated, and if he knew him to be under age, for treating with him in any other manner than to his advantage[l].

[l] Minoribus in integrum reſtitutio, in quibus ſe captos probare poſſunt, etſi dolus adverſarii non probetur, competit. *l.* 5. *C. de in integ. reſt. min.* See the third and ſeventeenth Articles. Qui cum alio contrahit, vel eſt, vel debet eſſe non ignarus conditionis ejus. *l.* 19. *ff. de reg. jur.*

IX.

9. The Minor is relieved againſt all ſorts of Acts or Deeds in which he is injured.

The Reſtitution of Minors is extended to all ſorts of Acts and Deeds without diſtinction. Thus, they are relieved not only when they are engaged to other perſons, as by a Loan, by a Sale, by a Partnerſhip, or by other ſorts of Covenants, if they have been wronged in them; but alſo when other perſons engage themſelves to them, if the Obligation made for their advantage was not ſuch as it ought to be, either for the Thing it ſelf that was due, or for the Security of the debt. Thus, they are reſtored againſt other Acts as well as Covenants: and they procure Sentences or Decrees of Courts of Juſtice, to which they have been Parties, to be reverſed, if their intereſt has not been ſufficiently defended. Thus, they are relieved, if they have innovated a Debt ſo as to make their condition worſe than it was, or if they have given an Acquittance for a Payment which was not made to their Guardian, but to themſelves, whether it be that they did not actually receive the Money, or that having received it, they have ſquandred it away fooliſhly. Thus, a Minor who had the choice either as Creditor, or as Debtor, to take or to give any one of two Things, will be relieved, if he has made a bad choice. And in general, Minors are reſtored againſt every thing which they may have done, or ſuffered, or omitted to do, from whence any prejudice may have happened to them[m].

[m] Ait prætor *geſtum eſſe dicetur.* Geſtum ſic accipimus, qualiter qualiter, ſive contractus ſit, ſive quidquid aliud contingit. Proinde ſi emit aliquid, ſi vendidit, ſi ſocietatem coiit: ſi mutuam pecuniam accepit & captus eſt, ei ſuccurretur. Sed etſi ei pecunia à debitore paterno ſoluta ſit, vel proprio, & hanc perdidit, dicendum eſt ei ſubveniri quaſi geſtum ſit cum eo. *l.* 7. §. 1. *ff. de minor. d. l.* §. 1. Sed & in judiciis ſubvenitur ſive dum agit, ſive dum convenitur captus ſit. *d. l.* 7. §. 4. Minus ex tutelæ judicio conſecuti, de ſuperfluo habere actionem ita poteſtis, ſi tempore judicii minores annis fuiſtis. *l.* 1.

l. 1. *ſi adv. rem, jud.* Si minor viginti quinque annis ſine cauſa debitori acceptum tulerit. *l.* 27. §. 2. *eod.* Si damnoſam ſibi novationem fecerit. *d. l.* 27. §. 3. Etſi in optionis legato captus ſit, dum elegit deteriorem, vel ſi duas res promiſerit, illam aut illam & pretioſiorem dederit, debere ſubveniri. *d. l.* 7. §. 7. See concerning Loan, the ſeventeenth Article of this Section.

X.

10. *He is relieved, if he has accepted an Inheritance, or Legacy, that is burdenſome, or refuſed one that is profitable.*

If a Minor has renounced an Inheritance which might have been profitable to him, he will be allowed to retract his Renunciation, and to accept the Inheritance[n]. And if on the contrary he has accepted a Succeſſion that is burdenſome, he may be relieved from it, and allowed to renounce it[o], the Creditors being called that he may deliver up into their hands the goods belonging to the Succeſſion[p]. And he may likewiſe be relieved againſt the Renunciation of a Legacy[q], which would have been profitable to him, or againſt his acceptance of one, if it was burdenſome by reaſon of ſome charge, or ſome diſadvantageous condition.

[n] Minores viginti quinque annis, non tantùm in his quæ ex bonis propriis amiſerunt, verùm etiam ſi hæreditatem ſibi delatam non adierint, poſſe in integrum reſtitutionis auxilium poſtulare, jamdudum placuit. *l.* 1. *ſicut om. hæred.*

[o] Sed etſi hæreditatem minor adiit minùs lucroſam, ſuccurritur ei, ut ſe poſſit abſtinere. *l.* 7. §. 5. *ff. de minor.*

Sed tamen & puberibus minoribus viginti quinque annis, ſi temerè damnoſam hæreditatem parentis appetierint, ex generali edicto quod eſt de minoribus viginti quinque annis, ſuccurrit. Cùm & ſi extranei damnoſam hæreditatem adierint ex ea parte edicti in integrum eos reſtituit. *l.* 57. §. 1. *ff. de acq. vel om. hæred.* See the two following Articles.

[p] *V. Nov.* 119. *c.* 6.

[q] Etſi ſine dolo cujuſquam legatum repudiaverit. *l.* 7. §. 7. *ff. de minor.*

XI.

11. *If the Succeſſion is profitable when the Minor enters to it, but becomes afterwards burdenſome by ſome accident.*

If after that a Minor has accepted an Inheritance that is profitable, it happens afterwards that the Goods are diminiſhed by ſome Accident, as if a Houſe that is part of the Succeſſion periſhes by Fire, if ſome of the Lands or Tenements are carried off by an Inundation, or if there happen other Loſſes of the like nature; the Minor having done in that caſe nothing but what every other perſon would, and ought to have done, he cannot have relief therein, ſo as to recover and receive back from the Creditors to the ſaid Succeſſion that which he had paid them[r].

[r] Si locupleti hæres extitit, & ſubitò hæreditas lapſa ſit (puta prædia fuerunt quæ chaſmate perierunt, inſulæ exuſtæ ſunt, ſervi fugerunt aut deceſſerunt) Julianus quidem libro quadrageſimo ſexto ſic loquitur quaſi poſſit minor in integrum reſtitui. Marcellus autem apud Julianum notat, ceſſare in integrum reſtitutionem. Neque enim ætatis lubrico captus eſt, adeundo locupletem hæreditatem, & quod fato contingit, cuivis patrifamilias quamvis diligentiſſimo poſſit contingere. Sed hæc res afferre poteſt reſtitutionem minori, ſi adiit hæreditatem in qua res erant mortales, vel prædia urbana, æs autem alienum grave, quod non proſpexit poſſe evenire ut demoriantur mancipia, prædia ruant, vel quod non citò diſtraxerit hæc quæ multis caſibus obnoxia ſunt. *l.* 11. §. 5. *ff. de min.*

We have not put down in this Article, that the Minor who has accepted a Succeſſion of which the Goods are periſhable, may for this reaſon be relieved from it; for Tutors are obliged by the Ordinances to ſell theſe ſorts of Goods, as has been ſaid in the thirteenth Article of the third Section of Tutors. And beſides, when a Minor accepts a Succeſſion, proviſion is made both for his ſecurity, and that of the Creditors to the Succeſſion, by the Inventory which the Tutor is obliged to make of the Goods belonging to the Succeſſion. For by the effect of this Inventory, the Minor is always in a condition to do Juſtice to the Creditors of the Succeſſion, and if afterwards it become burdenſome by loſſes of Goods of the kind mentioned in this Article, it is but juſt that his condition ſhould be the ſame with that of an Heir or Executor, who has the benefit of an Inventory, and who is never bound beyond the value of the Goods of the Inheritance, ſeeing the Inventory puts the Minor and the Creditors in the ſame condition. But if the Minor, or his Tutor, having employed the Moveable Effects of the Succeſſion for diſcharging a part of the Debts, and having paid the reſt of the Debts with the Minor's own Money, that the Immoveable Goods of the Inheritance might be preſerved entire to him, it ſhould happen afterwards that the ſaid Immoveables ſhould be loſt by Fire, by Inundations, or by other Events; this loſs, which might happen to the moſt prudent perſons, would not give a right to the Minor to demand back from the Creditors that which he had given them in payment out of his own proper Money. For on his part, he had acquitted himſelf of a duty that was incumbent on him, and had acted the part of a good and prudent manager; and the Creditors on their part had received nothing but what was juſtly due to them, and of which they might have been paid out of the Goods of the Inheritance, which they might have got expoſed to Sale before they had periſhed, if the Minor had renounced the Inheritance, or having accepted it, if he had not prevented their diligence at Law by making the ſaid Payment with his own Money.

XII.

12. *If the Succeſſion which the Minor has renounced, is cleared and diſentangled by another Heir.*

If a Minor having renounced a Succeſſion, he who ſucceeds in his place as Heir, whether by a Subſtitution, or as being Next of Kin, accepts of the Inheritance, and the Minor repenting afterwards of his having renounced, is deſirous to retract his Renunciation, and to accept the Succeſſion, he will be relieved, while things are ſtill entire. But if the Succeſſion being incumbred with Affairs and with Debts, had been cleared and diſentangled by the care of this other Heir, who had ſold Goods to pay off the Debts, and had ended all the Affairs; the Minor could not be relieved under theſe circumſtances, to deprive the ſaid Heir of the fruit of his labours[s].

[s] Scævola noſtra aiebat, ſi quis juvenili levitate ductus omiſerit, vel repudiaverit hæreditatem, vel bonorum poſſeſſionem: ſi quidem omnia in integro ſint, omnimodò audiendus eſt. Si verò jam diſtracta

tracta hæreditate, & negotiis finitis, ad paratam pecuniam laboribus ſubſtituti veniat, repellendus eſt. *l.* 24. §. 2. *ff. de minor.*

XIII.

13. *The Reſtitution takes place, for the profits of which the Minor has been deprived.*

Minors are relieved not only when they ſuffer loſs, but alſo when they are deprived of ſome profit which they ought to have had[t]. Thus, for example, if a Minor that is Heir to a perſon who was engaged in a Partnerſhip, being outwitted by the other Partners, had renounced the ſhare he had in it, at the time that an Affair begun with the deceaſed was about to yield ſome profit, he would be relieved. Thus, Minors are reſtored if they have renounced Inheritances, or Legacies, as has been ſaid in the tenth Article.

[t] Hodie certo jure utimur ut & in lucro minoribus ſuccurratur. *l.* 7. §. 6. *ff. de minor.* Aut quod habuerunt amiſerunt, aut quod acquirere emolumentum potuerunt, omiſerunt. *l.* 44. *eod.* Placuit minoribus etiam in his ſuccurri quæ non acquiſierunt. *l.* 17. §. 3. *ff. de uſur.* See the tenth Article.

XIV.

14. *The Minor is relieved from an Engagement that would run him into Law Suits, and Expences.*

Although the Engagement into which a Minor had entred might not occaſion him any preſent loſs in his Goods; he will nevertheleſs be relieved from it, if in other reſpects it ſhould be diſadvantageous to him. As if he had engaged in ſome Buſineſs, or ſome Commerce which would run him into Law-Suits, Expences, or other conſequences which it would have been his intereſt to have avoided and prevented: or if he had accepted an Inheritance incumbred with affairs that would have required a long and tedious diſcuſſion[u].

[u] Minoribus viginti quinque annis ſubvenitur per in integrum reſtitutionem, non ſolùm cum de bonis eorum aliquid minuitur, ſed etiam cùm interfit ipſorum litibus & ſumptibus non vexari. *l.* 6. *ff. de minor.*

Neque illud inquiritur ſolvendo ſit hæreditas, an non ſit: opinio enim, vel metus, vel color ejus qui noluit adire hæreditatem inſpicitur, non ſubſtantia hæreditatis: nec immeritò. Non enim præſcribi hæredi inſtituto debet, cur metuat hæreditatem adire, vel cur nolit: cùm variæ ſint hominum voluntates, quorumdam negotia timentium, quorumdam vexationem, quorumdam æris alieni cumulum, tametſi locuples videatur hæreditas. *l.* 4. *in f. ff. ad Senat. Trebell.*

Although this Law have relation to another ſubject, yet theſe words may be applied here.

See the tenth Article.

XV.

15. *The Minor is relieved againſt a Compromiſe.*

If a Minor has referred ſome matter in diſpute to an Arbitration, he may be reſtored againſt it, even although he had been authorized by his Tutor to compromiſe the matter[x]. For although it be uſual for prudent and wiſe perſons to put their Rights into the hands of Arbitrators; yet the Minor may have been deceived either in the choice of the Arbitrators, or in referring to Arbitration a Right that is indiſputable. And although his Tutor had authorized him to conſent to the ſaid Reference, yet nevertheleſs he would be relieved againſt it[y].

[x] Minores ſi in judicem compromiſerunt, & tutore auctore ſtipulati ſint, integri reſtitutionem adverſus talem obligationem jure deſiderant. *l.* 34. §. 1. *ff. de minor.*

[y] See the nineteenth Article.

XVI.

16. *Reſtitution againſt an Omiſſion.*

Minors are not only relieved againſt what they may have done to their own prejudice, but they may likewiſe have relief for having omitted that which they were obliged to do, in the caſes where this omiſſion may be repaired. Thus, for example, if the Father of a Minor having purchaſed an Eſtate, on condition that if the Price were not paid by a certain time, the Sale ſhould be made void; the Minor, Heir to his Father, omits to pay the Money within the time, and even although the Minor's Guardian have been ſummoned to pay the ſame, and that for default of payment the Seller has been reſtored to his Eſtate, whether it were with the conſent of the Guardian, or by a Sentence of the Judge, yet the Minor may be admitted to take poſſeſſion again of the Eſtate, he paying the Price[z]. Unleſs it ſhould happen that by reaſon of particular circumſtances the things were not any more in ſuch a condition as that the Minor ought to be received to make payment, as if the Sale had not been vacated till after a long time, and after many delays granted to him for paying the Price to the Seller; who having occaſion for the Money to acquit preſſing debts, had been obliged to ſell the Eſtate, to avoid a Seizure of his Goods which had been made by a Creditor.

[z] Minoribus in his quæ vel prætermiſerunt, vel ignoraverunt, innumeris auctoritatibus conſtat eſſe conſultum. *l. pen. C. de in int. reſt. min.*

Æmilius Larianus ab Obinio fundum Rutilianum lege commiſſoria emerat, data parte pecuniæ, ita ut ſi intra duos menſes ab emptione, reliqui pretii partem dimidiam non ſolviſſet, inemptus eſſet: item, ſi intra alios duos menſes reliquum pretium non numeraſſet, ſimiliter eſſet inemptus. Intra priores duos menſes Lariano defuncto, Rutiliana pupillaris ætatis ſucceſſerat, cujus tutores in ſolutione ceſſaverunt: venditor denunciationibus tutoribus ſæpe datis, poſt annum eandem poſſeſſionem Claudio Telemacho vendiderat. Pupilla in integrum reſtitui deſiderabat: victa tam apud prætorem, quàm apud præfectum urbi, provocaverat. Putabam bene judicatum,